Supreme Court, U.S.
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NO. ~~OFFICE OF~~ THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioner,

vs.

S-W INDUSTRIES, INC.,

Respondent,

vs.

AETNA CASUALTY & SURETY COMPANY; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.; THE TRAVELERS INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; YOUELL & COMPANIES; J.F. GREEN & OTHERS; H.S. WEAVERS AGENCIES, LTD.; UNDERWRITERS AT LLOYDS, LONDON.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth District

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PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED

1. Whether a federal court of appeals is free to disregard syllabus law of the Ohio Supreme Court in creating a new standard applicable only in Ohio federal courts to allow employers accused of committing work-related intentional torts to obtain defense and indemnification payments from their comprehensive general liability insurers under occurrence policies providing coverage for bodily injuries "neither expected nor intended" from the standpoint of the insured?

2. Whether a federal court of appeals is bound by the full faith and credit statute and principles of collateral estoppel to adhere to findings of an Ohio court of appeals regarding an employer's state of mind in committing a work-related intentional tort?

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Petitioner, Lumbermens Mutual Casualty Company ("Lumbermens"),[1] petitions for a writ of certiorari and asks this Court to reverse section C(1) of the divided Opinion and Amended Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Sixth Circuit issued on February 28, 1994 is attached as Appendix A.

2. The Amended Opinion of the United States Court of Appeals for the Sixth Circuit issued on April 7, 1994 is attached as Appendix B.

3. The Memorandum and Order of the United States District Court for the

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[1] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Lumbermens represents that it has no parent companies or subsidiaries.

Northern District of Ohio is attached as Appendix C.

JURISDICTION

The Sixth Circuit issued its Opinion in this matter on February 28, 1994 (Appendix A). On April 6, 1994, the Sixth Circuit issued an Order denying Lumbermen's Petition for Rehearing (Appendix D). The Sixth Circuit then issued an Amended Opinion on April 7, 1994 (Appendix B). This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

The Rules of Decision Act, relevant to the first question presented, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

The Full Faith and Credit Statute, relevant to the second question presented, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

Lumbermens brought this action in the United States District Court for the Northern District of Ohio on May 19, 1986, invoking that court's diversity jurisdiction under 28 U.S.C. § 1332. Named as defendants were S-W Industries, Inc. ("S-W"), and several insurance carriers which had issued insurance policies to S-W. The purpose of the action was to obtain a declaration of Lumbermens' rights under, among other things, certain comprehensive general liability ("CGL") and excess umbrella ("E/U") insurance policies issued to S-W. Specifically, Lumbermens sought a declaration that it had no obligation to indemnify S-W for a $3.65 million work-related intentional tort verdict obtained by Carl Viock, an S-W employee, and his wife against S-W in 1984. The verdict was affirmed by the Ohio Court of Appeals for Erie County in Viock v. Stowe-Woodward Co., No. E-84-27, 1986 WL 3254 (Ohio Ct. App. 1986).

The CGL and E/U policies issued by Lumbermens and other insurers to S-W limited coverage to injuries "caused by or arising out of an occurrence." The policies defined "occurrence" as "an event, . . . neither expected nor intended from the standpoint of the insured." On the basis of this language, Lumbermens and the other insurers moved for summary judgment on the ground that injuries resulting from a work-related intentional tort were by definition "expected or intended" within the meaning of the policy language and therefore could not be the product of an "occurrence."

The district court (Judge John Potter) granted the insurers' motions for summary judgment, and properly applied well-established Ohio law in so doing. Memorandum and Order, pp. 43-46 (Appendix C). The district court first noted, under the standard set forth in the syllabus of Jones v. VIP Development Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), that "an intentional tort is 'an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.'" Memorandum and Order, p. 11 (citing Jones, Syllabus). Recognizing that the Ohio Court of Appeals for Erie County decided the Viock case under the Jones standard, it was clear to the district court that S-W could not have acted with the intent requisite to commit an intentional tort and yet not have expected an injury to occur. Memorandum and Order, pp. 11-12. Since expected injuries were not "occurrences" under the "neither expected nor intended" language of the policies, the district court found that the Viock judgment was not covered. Id. at 12.

In addition to the plain language of the CGL and E/U policies, the district court recognized that its decision was controlled by the "leading case" of Wedge Products, Inc. v. Hartford Equity Sales Co., 31 Ohio St. 3d 65, 509 N.E.2d 74 (1987), where the Ohio Supreme Court reached an "identical result" under the identical test for intentional tort liability and under identical policy language. Memorandum and Order, p. 12. In Wedge Products, the highest court in Ohio issued a declaratory judgment finding that "[a]n intentional tort [under Jones v. VIP] committed by an employer against its employee is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer." Wedge Products, Syllabus. In light of Wedge Products, the district court reaffirmed its holding that there was no coverage under the CGL and E/U policies. Memorandum and Order, pp. 12-13.

S-W appealed this holding, then all but abandoned its position on appeal, devoting only one page to a half-hearted argument that flew in the face of Wedge Products. The Sixth Circuit nevertheless reversed, substituting its own view of insurance coverage for work-related intentional torts for that of the Ohio Supreme Court.

The Sixth Circuit ignored the syllabi of both the Jones v. VIP and Wedge Products cases. Instead of following the controlling rules set forth therein, the majority speculated that "if the Ohio Supreme Court were to reexamine this issue in light of [perceived] public policy changes," the Ohio court might rule differently than it already had. The Sixth Circuit went on to create a new rule allowing an employer to obtain a declaration of coverage in federal court by showing that it merely "should have been aware" of the risk to its employee. Opinion and Amended Opinion, p. 16. Judge Ryan recognized in dissent that the Ohio

Supreme Court's controlling opinion in Wedge Products rendered it "indisputable" that the district court's judgment should be affirmed. Opinion and Amended Opinion, p. 30.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Is Obliged To Follow Controlling Ohio Syllabus Law.

The Sixth Circuit went on an impermissible frolic. This Court should take this opportunity to remind the Sixth Circuit that it is obliged to follow Ohio law as declared by the Ohio Supreme Court, and is not free to create new rules and standards applicable only in the federal courts sitting in Ohio. This practice, once sanctioned by the rule of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842), has long since been prohibited.

In Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938), this Court rejected the rule that federal courts were "free to exercise an independent judgment as to what the common law of a state is -- or should be." The Court recognized in Erie that the prior rule made rights enjoyed under the common law "vary according to whether enforcement was sought in the state or in the federal court." Id. at 74-75. To correct this injustice, this Court declared that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . whether . . . declared by its Legislature in a statute or by its highest court in a decision . . . ." Id. at 78.

As this Court has often noted, the Ohio Supreme Court declares Ohio law only through the syllabi of its opinion. State of Ohio v. Gallagher, 425 U.S. 257, 259 (1976); Beck v. State of Ohio, 379 U.S. 89, 93, n. 2 (1964); Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 441 (1952). The Syllabus Rule has been followed in Ohio for more than 100 years. Beck, 379 U.S. at 93, n. 2.

Here, the Sixth Circuit flatly refused to follow the syllabus of Wedge Products, Inc. v. Hartford Equity Sales Co., 31 Ohio St. 3d 65, 509 N.E.2d 74 (1987), where the Ohio Supreme Court declared the law of Ohio to be as follows:

> An intentional tort allegedly committed by an employer against its employee is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer.

Instead, the Sixth Circuit sought to divine Ohio public policy regarding the insurability of work-related intentional torts, and misspeculated that the Ohio Supreme would re-examine its holding in Wedge Products in light of perceived changes in Ohio public policy, Opinion, p. 16, despite the fact that public policy concerns are not mentioned in the syllabus to Wedge Products, and were only an afterthought in the body of the opinion. Wedge Products, 31 Ohio St. 3d at 67

("Moreover, public policy is contrary to insurance against intentional torts.").

The effect of the Sixth Circuit's ruling is to create what Erie and its progeny sought to avoid: "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." Salve Regina College v. Russell, 499 U.S. 225, 234 (1991). The Ohio Supreme Court has held, in a declaratory judgment action and as a matter of law, that employers cannot obtain insurance coverage for work-related intentional torts under liability policies providing coverage for injuries "neither expected nor intended" by the employer. Wedge Products, Syllabus. The Sixth Circuit has now created a new rule (binding on the district courts in Ohio) under which the jury must decide if the injuries resulting from an employer's "intentional" work-related tort were "neither expected nor intended." A certain consequence of this ruling is that insured Ohio employers accused of committing work-related intentional torts will sue their general liability insurers in federal court in Ohio for defense and indemnification payments, claiming that coverage is not precluded by the Ohio Supreme Court's decision in Wedge Products.

To reiterate, the Ohio state courts have, without exception, barred Ohio employers from obtaining insurance coverage for work-related intentional torts when their policies cover "occurrences" which the employers "neither expected nor intended." The two most recent illustrations of the application of this rule are Continental Ins. Co. v. United Foundries, Inc., No. CA 9342, 1993 Ohio App. LEXIS 6494, at *5 (Stark Cty. Dec. 30, 1993), and Royal Paper Stock Co. v. Meridian Ins. Co., No. 93APE09-1345, 1994 Ohio App. LEXIS 1553, at *12 (Franklin Cty. April 12, 1994). Contrary to uniform Ohio law, the Sixth Circuit has determined that coverage is available if the employer can show that it was only negligent in committing the work-related intentional tort. Opinion, p. 14.

Ohio employers who can satisfy 28 U.S.C. § 1332 (the vast majority given that most insurers are incorporated and headquartered out of state) now have a new attractive forum. Any insured Ohio employer currently faced with an intentional tort action or who paid an intentional tort verdict or settlement in the past fifteen years (and who rightfully believed it had no insurance coverage under Ohio law), will now sue in federal court in Ohio to take advantage of the Sixth Circuit's new rule. This Court must intercede to enforce its rule that a litigant's choice of a state or federal forum should not determine the result of the litigation.

II. The Full Faith And Credit Statute And Principles Of Collateral Estoppel Preclude The Federal Courts From Relitigating The Issue of S-W's State Of Mind.

In addition to the deleterious impact of the Sixth Circuit's Opinions on the administration of justice in future intentional tort coverage litigation, the impact in this case is disastrous. Under the Sixth Circuit's ruling, the district court, and the federal court jury, must now redecide S-W's state of mind at the time of causing injury to Carl Viock. This is so even though the jury in the underlying Viock suit and the Ohio Court of Appeals for Erie County have previously determined that S-W acted with the intent to injure Mr. Viock or with the belief that such injury was substantially certain to occur. Viock v. Stowe-Woodward Co., No. E-84-27, 1986 WL 3254, slip op. at 14 (Ohio Ct. App. 1986) (noted in Opinion, p. 30).

The Full Faith and Credit Statute precludes this precise result. That statute is the major source of the rule that federal courts must honor the res judicata effects of state court judgments, and provides that the judicial proceedings of any state shall receive full faith and credit "in every court within the United States." 28 U.S.C. § 1738. The very well-established rule (neglected by the Sixth Circuit) is that a state court judgment commands the same res judicata effect in federal court that it would have in the court that entered it. St. John v. Wisconsin Employment Relations Bd., 340 U.S. 411 (1951); State Corp. Comm'n. v. Wichita Gas Co., 290 U.S. 561, 569 (1934); Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 428-29 (1910).

In the decision in Viock v. Stowe-Woodward Co., No. E-84-27, 1986 WL 3254 (Ohio Ct. App. 1986), the Ohio Court of Appeals for Erie County expressly found that the evidence before the jury was sufficient to support a finding that S-W had committed an intentional tort under the standard set forth by the Ohio Supreme Court in Jones v. VIP Development Co., 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984). See Opinion, p. 30. In Jones, the Ohio Supreme Court declared that: "an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." Jones, Syllabus 1. Under well-established Ohio law, collateral estoppel precludes relitigation of a tortfeasor's mental state in a subsequent action by the tortfeasor against his insurer. Howell v. Richardson, 45 Ohio St. 3d 365, 544 N.E.2d 878, Syllabus 1 (1989).

The federal courts are bound by the finding of the Ohio Court of Appeals for Erie County with respect to S-W's state of mind in causing injury to Mr. Viock. Either S-W intended to cause injury or acted with the belief that such injury was substantially certain to occur. As such, it was not possible for S-W to have acted with the intent to commit an intentional tort, yet not have intended or expected the injury to Mr. Viock to occur. To allow the Sixth Circuit to direct the district court to relitigate S-W's state of mind would be to countenance a flagrant violation of the Full Faith and Credit Statute and a tremendous waste of resources.

CONCLUSION

Based on the foregoing, Lumbermens' Mutual Casualty Company respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0068P (6th Cir.)
File Name: 94a0068p.06

Nos. 92-4182/4212

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUMBERMENS MUTUAL CASUALTY COMPANY,
Plaintiff-Appellee, Cross-Appellant,

v.

S-W INDUSTRIES, INC.,
Defendant-Appellant, Cross-Appellee,

AETNA CASUALTY & SURETY COMPANY; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.; THE TRAVELERS INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; YOUELL & COMPANIES; J.F. GREEN & OTHERS; H.S. WEAVERS AGENCIES, LTD.; UNDERWRITERS AT LLOYDS, LONDON,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed February 28, 1994

Before: RYAN and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge.[*]

SUHRHEINRICH, Circuit Judge, delivered the opinion of the court. RYAN, Circuit Judge (pp. 29-30) and JOINER, Senior District Judge (pp. 31-33), delivered separate opinions concurring in part and dissenting in part.

SUHRHEINRICH, Circuit Judge. Lumbermens Mutual Casualty Company (Lumbermens) filed suit seeking a declaratory judgment as to its obligations under certain insurance policies issued to S-W Industries, Inc. (S-W). Because they also had issued various policies to S-W, Lumbermens named as defendants Aetna Casualty & Surety Company (Aetna), Employers' Liability Assurance Corporation, Ltd. (ELAC), The Travelers Insurance Company (Travelers), American Home Assurance Company (AHAC), National Union Fire Insurance Company (NUFIC),[1] Youell & Company (Youell); J.F. Green & Others (Green); H.S. Weavers Agencies, Ltd. (Weavers)

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[*] The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The district granted summary judgment to National Union Fire Insurance Company on the ground that S-W had failed to show it had purchased a policy from that insurer. S-W does not challenge this judgment on appeal.

(collectively, "appellee-insurers"). The district court granted summary judgment to each of the insurers on the grounds that the judgment for which S-W seeks indemnification did not come within the coverage provisions of, or fell within exclusions to, each of the various insurance policies. S-W appeals and Lumbermens cross-appeals. We have jurisdiction, 18 U.S.C. § 1332(a)(1); Fed. R. Civ. P. 54(b), and now **AFFIRM**, in part, and **VACATE**, in part, and **REMAND** this case to the district court for further proceedings.

I.

Carl Viock, an employee of S-W from 1968 to 1981, worked cementing strips of rubber onto rotating drums. As a result, he was continually exposed to the fumes from highly-volatile, toxic cements and solvents as well as various congestive dusts created by the plant's rubber fabricating processes. In 1976, Viock was hospitalized and diagnosed with pneumonia caused by his continual exposure to chemicals at work. Upon his release, Viock returned to work with his doctor's restriction that he work only in a chemical-free and dust-free environment. S-W contended that no such environment existed at its plant and Viock, facing unemployment, had his doctor remove the restriction. Viock returned to his job and continued to suffer symptoms of his lung disease. Each day, Viock spent his lunch hour connected to an IPPB, a machine used to clear his congested lungs and aid his breathing. Viock's manager at the plant even suggested that Viock bring the IPPB to work so that he would not have to leave the plant during his lunch hour.

Upon his return to work, Viock sought and received benefits under Ohio's Workers Compensation scheme. Union representatives also requested that Viock's work area be ventilated with exhaust fans. S-W responded by offering Viock a respirator and by installing a portable fan near Viock. Nevertheless, by 1981, Viock's condition had worsened and S-W requested that he be examined by the company's physician. The physician concluded that Viock's lung condition had progressed to the point that he could no longer be productive in his job and, accordingly, Viock was terminated on June 1, 1981.

Eight months later, Viock sued S-W alleging that S-W "fraudulently, intentionally and/or maliciously disguised working conditions and/or concealed from [him] and his physician material information and warnings concerning the toxic substances to which [he] was continuously and repeatedly exposed." Mrs. Viock also sued for her loss of consortium stemming from the injuries to her husband. A jury returned compensatory damage awards in favor of the Viocks in the amount of $1,150,000 and assessed punitive damages against S-W in the amount of $2,500,000. The Ohio Court of Appeals affirmed, in full, the Viocks' awards. S-W claims, and it is not disputed, that it has paid this judgment.

In 1986, Lumbermens filed this action seeking a declaratory judgment regarding its liability under certain insurance policies sold to S-W for the sums S-W paid to the Viocks. Lumbermens also named as defendants S-W's other insurers that had policies in force during the applicable period. All parties moved for summary judgment on the question of coverage. The district court granted summary judgment to each of the insurers on the grounds that no coverage existed under any of the various policies at issue-and, pursuant to Federal Rule of Civil Procedure 54(b), certified these judgments as final for purposes of this appellate review. Notices of appeal and cross-appeal were timely filed.

II.

As there are seven appellee-insurers raising some thirty or more points in affirmance of the district court's decision, the needs of clarity and organization demand that certain overarching issues be resolved first. Then, applying the resolution of these issues, the liability of each insurer is considered in turn.

A. Public Policy

The appellee-insurers contend that, even if their policies can be read to provide coverage for S-W's liability to the Viocks, the public policy of Ohio forbids the enforcement of those provisions on the grounds that an intentional tortfeasor may not seek indemnification through insurance. The Viocks' cause of action, they argue, was based on S-W's intentional torts and, therefore, the judgment which resulted must be borne by S-W alone.

Based upon the Ohio Supreme Court's interpretation of that state's public policy, we hold that Ohio law does not prohibit indemnification of the $1,150,000 that S-W paid in compensatory damages. Ohio public policy does prohibit, however, any indemnification of the $2,500,000 punitive damage award and, to that extent, the district court's grants of summary judgment in favor of the insurers in this case are affirmed.

1. The Viocks' claim

To address the appellee-insurer's assertions of Ohio public policy, we must first review the nature of the Viocks' cause of action against S-W. Viock's injuries undisputedly occurred in the workplace and, ordinarily, compensation for such injuries is restricted in Ohio to an award of workers compensation benefits. *See* Ohio Const. art. II, § 35; Ohio Rev. Code Ann. § 4123.74 (Anderson). The Ohio Supreme Court, however, has recognized that Ohio's workers compensation scheme provides no immunity for an employer's *intentional* torts against its employees. Thus, where an employee's injuries are the product of his employer's intentional torts, recovery may be sought under the common law. *Blankenship v. Cincinnati Milacron Chems.*, 433 N.E.2d 572, 576 (Ohio 1982).

In the context of employer intentional torts, it was necessary to define what actions by employers, other than those taken with the subjective purpose of injuring a specific employee, would be considered to have been "intentionally" tortious. The Ohio Supreme Court first addressed this issue in *Jones v. VIP Development Co.*, 472 N.E.2d 1046 (Ohio 1984). The court stated:

> [A] specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain, not merely likely, to occur. It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct.

Id. at 1051. Thus, the common law element of "intent" encompasses (1) direct intent--a desire or purpose to cause a particular result, and (2) presumed intent--proceeding in the face of a risk that a particular result is substantially certain to occur. The court in *Jones* held that allegations that an employer "knew or should have known" of a very great risk of injury were sufficient to state a cause of action. *Id.* at 1051-52. Though *Jones* was not decided until after the trial in the Viocks' case, the Ohio Court of Appeals applied *Jones* in determining that the instructions given the jury in that case adequately stated the law of intentional torts. *Viock v. Stowe-Woodward Co.*, No. E-84-27, 1986 WL 3254, at *9-11 (Ohio Ct. App. 1986).

The appellee-insurers, in invoking Ohio's public policy, assert that S-W was found liable for acts committed with "direct intent" within the framework just discussed. The district court, however, determined that the basis for the jury's awards was S-W's "presumed intent." We agree.

The jury in the Viocks' case was specifically instructed that it need not believe that S-W had a specific intent to injure Carl Viock to hold S-W liable for his injuries. Rather, the jury was instructed on both the "direct" and "presumed" categories of intentional torts. The appellee-insurers argue that the jury had to have believed that S-W acted with "direct intent" because it awarded punitive damages. The question of punitive damages, however, was argued to the jury on the basis that S-W had "reckless[ly] disregard[ed] the rights of another," not on the basis that it was S-W's purpose to injure Viock.

In lieu of a general verdict form, the jury in the Viocks' state-court trial responded to fifteen special interrogatories. The second interrogatory, answered in the affirmative by all eight jurors, asked: "Do you find by a preponderance of the evidence that Stowe-Woodward Company's intentional *conduct* injured Carl Viock?" [Emphasis added.] In awarding $2,500,000 in punitive damages, the jury responded to the seventh interrogatory which asked: "If you find that Stowe-Woodward Company's intentional *conduct* injured Carl Viock, what punitive damages, if any, do you award the Plaintiff?" [Emphasis added.] Twice more, the jury was asked for findings based upon S-W's intentional conduct. The jury was not asked to find that S-W had, as its purpose, to injure Viock, nor do any of the jury's responses justify such an inference.

Based upon the Viocks' complaint, the arguments of counsel, the trial judge's instructions and, most importantly, the jury's responses to special interrogatories, we believe that the Viocks' recovery was premised on this second category--"presumed intent."

2. Indemnification of compensatory damages

Thus, the question becomes whether Ohio's public policy forbids an employer from insuring against liabilities arising from those acts taken where the employer knew or should have known of a risk that injury to an employee was substantially certain to occur. This question was squarely addressed in *Harasyn v. Normandy Metals, Inc.*, 551 N.E.2d 962 (Ohio 1990). There, the court rejected any "blanket prohibition" and held that the "better view is to prohibit insurance only for those intentional torts where the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character." *Id.* at 965 (quotation marks omitted). The court concluded that, while the presence of insurance may encourage those who commit "direct intent" intentional torts, "public policy does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur." *Id.* at 965-66.

Accordingly, we hold that Ohio public policy does not bar indemnification of S-W's liability to the Viocks arising out of their $1,150,000 compensatory damages awards.

3. Indemnification of punitive damages

The issue of whether S-W may seek coverage for the $2,500,000 in punitive damages paid to the Viocks, however, is substantially different. In *Harasyn*, the court noted that "because punitive damages are awarded to punish and deter the tortfeasor rather than to compensate the victim, there is a much different and stronger public policy interest against insurance coverage which would indemnify the tortfeasor against punitive damages." *Harasyn*, 551 N.E.2d at 965 n.3. To date, the Ohio Supreme Court has not ruled directly on the question of whether Ohio's public policy forbids the indemnification of punitive damage awards. The Ohio Court of Appeals, however, has held that such coverage would violate Ohio public policy. *Casey v. Calhoun*, 531 N.E.2d 1348, 1351 (Ohio Ct. App. 1987).

Therefore, we think it clear, and now hold, that Ohio law prohibits the indemnification of monies paid pursuant to an award of punitive damages arising out of the insured's own conduct. The district court's summary judgments in favor of the insurers, to the extent of the $2,500,000 punitive damage award, are affirmed.

B. Implied Exclusion for Changes in the Common Law

Most, if not all, of the appellee-insurers argue that, because the policies at issue were sold to S-W prior to the Ohio Supreme Court's 1982 decision in *Blankenship*, those policies cannot now be construed to cover liabilities flowing from an intentional tort suit brought under *Blankenship*. In essence, they urge this court to imply an exception to the broadly worded grants of coverage to the effect that no liability is covered unless it could have been imposed as of the date the policy was issued. The district court found the insurers' argument persuasive and granted summary judgment to the insurers on that basis. We disagree.

The only Ohio authorities cited by the appellee-insurers in support of their argument are *Home Indemnity Co. v. Village of Plymouth*, 64 N.E.2d 248 (Ohio 1945), and *Howe v. Crumley, Jones & Crumley Co.*, 57 N.E.2d 415, 418-19 (Ohio Ct. App. 1944). These cases, the appellee-insurers contend, stand for the proposition that an insurance contract "freezes in time" the scope of the insured's liabilities for which coverage is provided. We are unpersuaded.

In *Home Indemnity*, 64 N.E.2d at 250-51, the court, faced with an ambiguity in an insurance policy's exclusions, looked to the circumstances surrounding the purchase of the policy to determine the parties' intent. The case does not involve a post-issuance change in the law regarding the village's liability to its employees. Instead, it is a straightforward application of the basic rules of insurance contract interpretation. Similarly, *Howe*, 57 N.E.2d at 418, fails to support the appellee-insurer's contention because the issue, again, was the parties' intent, not a post-issuance change in the law.

We reject the appellee-insurers' argument because it runs contrary to the settled law of insurance. In discussing the risks ordinarily transferred by a liability insurance policy, a leading treatise uses the example of a motor vehicle liability policy:

> Even if the accident occurs in a jurisdiction in which there is a judicial precedent that limits or precludes any liability to the spouse of an injured person, there is *still the possibility that this precedent will be overturned*. This *uncertainty* is *also* within the bundle of risks that is *transferred* to the insurer by the . . . policy.

Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 9 (1988) (emphasis added).

Here, the broad coverage provisions in S-W's insurance contracts, though issued prior to the *Blankenship* decision, may fairly be read to cover this type of liability and the insurers have not established a contrary intent. The policies in question are, for the most part, multi-state policies intended to cover S-W's operations in many states. At the time these policies were issued, at least some states allowed intentional tort claims by an employee against his employer. *See Blankenship*, 433 N.E.2d at 576-77, nn.8-9, 11 (citing cases from Minnesota, New York, Massachusetts, and West Virginia from as far back as 1930). Thus it cannot be said that such liabilities were not foreseeable at the time these policies were issued to S-W.

Nor are we convinced that the *Blankenship* decision amounted a to "change" in the law in the way that the appellee-insurers describe. A cause of action for intentional tort is not new. The most that can be said is that, for the period between the advent of workers compensation and *Blankenship*, employers who committed intentional torts against their employees thought they enjoyed, and during this time many of the lower courts of Ohio provided, immunity from such suits at common law. *Blankenship* did not "invent" or "recognize" a cause of action or "revoke" any employer's immunity, as the appellee-insurers contend.

It merely disabused employers (and their insurance companies) of the idea that Ohio's constitution or its workers compensation laws provided any immunity from intentional tort suits. In *Blankenship*, three judges of the Ohio Supreme Court specifically pointed out that "[t]his court has never yet ruled that an employer may intentionally harm an employee and remain immune to civil suit." *Blankenship*, 433 N.E.2d at 579 (Clifford Brown, J., concurring). Such suits have always existed at common law and, absent an unequivocal intent in the statute or constitution to abrogate it, "the common law right of action against an employer . . . for intentional torts *remains*." *Id.* (emphasis added).

Therefore, we hold that these insurers may not avoid coverage, where the plain language of their policies clearly provides it, on the basis that a suit such as the Viocks' probably, although not certainly, would not have been successful at the time the policies were issued.

C. Plain Language Arguments

S-W's various policies can be classified into four general categories: (1) Comprehensive General Liability policies (GCL's); (2) Workers Compensation and Employers Liability policies (WC/EL's); (3) Excess or Umbrella Liability policies (E/U's); and (4) Work-in-Progress policies (WIP's). Each of the insurers make "plain language" arguments to the effect that no coverage for S-W's liabilities exists. These arguments are considered in turn.

1. GCL and E/U policies

The GCL and E/U insurers contend that no coverage exists because the plain language of their policies limits coverage to those injuries "caused by or arising out of an occurrence." An "occurrence" is defined as "an event, including continuous or repeated exposure to conditions which result in Personal Injury or Property Damage *neither* *expected nor intended from the standpoint of the insured.*"[2] [Emphasis added.] The insurers argue that injuries resulting from an intentional tort must, by definition and in every case, be "expected or intended" and are, therefore, not the product of an "occurrence." The district court agreed and granted summary judgment to these insurers on this basis.

After reviewing Ohio law, we are not persuaded that the Ohio courts would, as a matter of law and in every case, exclude coverage under an "expected or intended" clause for every liability arising out of an employer's intentional torts. We hold, instead, that the question of whether S-W "expected or intended" Viock's injuries is a question of fact. We further hold that this fact question is not coextensive with, and therefore is not determined by, whether S-W's conduct was found to constitute an "intentional" tort under the law of Ohio at the time of the Viocks' trial. Because the record raises a genuine issue as to this material question of fact, the summary judgments of the district court on these grounds are vacated.

The Ohio Supreme Court has stated that the purpose of the "expected or intended" clause is to "prevent[] individuals from purchasing insurance as a shield for their *anticipated* intentional conduct." *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986) (emphasis added). The clause seeks to preserve the element of "fortuity"; a "fundamental principle" of insurance law. *See* Keeton & Widiss, *Insurance Law* § 5.3(a), at 475. To allow an insured to be indemnified for anticipated losses, the Ohio Supreme Court noted, would render an insurance company's risk "incalculable" and, therefore, liability policies rightfully exclude such losses. *Thompson*, 491 N.E.2d at 691.

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[2] While the precise language of any one particular policy may vary from that just quoted, the variations are immaterial to our analysis and, for ease of discussion, are disregarded.

The aim of the common law of intentional torts, however, encompasses a somewhat broader range of losses. There, an actor is held responsible for those results he purposefully causes and, in addition, those results that were so substantially certain to flow from his acts that the law should presume those results to have been "intended." In *Jones*, the Ohio Supreme Court rejected the idea that an employee must show that it was his employer's purpose to injure him in order to recover in tort. Rather the court held that the law of intentional torts also condemns actions of an employer taken "with the belief that such injury is substantially certain to occur." *Jones*, 472 N.E.2d at 1051. The focus in *Jones*, however, was not the employer's actual belief but rather the near-certainty of the risk. *See Jones*, 472 N.E.2d at 1051-52 (holding plaintiffs' complaint alleging that employer "knew or should have known" to be a "sufficient allegation of intentional misconduct").[3]

Thus, in the Viocks' case, decided under *Jones*, S-W could have been found liable for an intentional tort on either of two grounds: (1) that it had acted in the face of a very great risk that injury to Viock would occur, a risk of which S-W was *actually* aware; or (2) that it had acted in the face of a very great risk that injury to Viock would occur, a risk of which S-W was not aware but of which it *should have been* aware. Under the first alternative, it would appear that coverage is precluded by the "expected or intended" clause in that the injury to Viock could fairly be said to have been expected.[4] Under the second alternative, however, coverage is not precluded because the clause, by its own terms, excludes only injuries expected or intended "from the standpoint of the insured" and, therefore, does not extend to injuries the insured "should have expected," but did not actually and subjectively expect.[5]

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[3] In *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489 (Ohio 1988), the Ohio Supreme Court revisited, with the express purpose of "significantly limiting" the holding of *Jones*. *Id.* at 504. To recover, the court held that an employee must prove that (1) the employer had *actual* knowledge of "the existence of a danger[] . . . within his business operation," and (2) that the employer had *actual* knowledge that, "harm to [the employee] would be a substantial certainty . . . ." *Id.*

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[4] Thus, under *Fossen*'s requirement of actual knowledge, intentional tort liability would be coextensive with the "expected or intended" clause in the GCL policies. S-W's liability, however, arose under the more-inclusive *Jones* standard.

It should also be noted that *Fossen*, as written, is not even the law in Ohio today. The pendulum reversed course again in *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108, 1111-12 (Ohio 1991), when the Ohio Supreme Court eased *Fossen*'s strict requirements and permitted liability even without a showing of actual knowledge that the employee's injuries were substantially certain to occur.

[5] With respect to this issue, the Kentucky Supreme Court recently stated:

> The "expected or intended" exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim. . . . We believe this to be the majority rule, and we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury was intentional and the injury foreseeable. . . .
>
> . . . .
>
> . . . . The policies here state that the insurer has a duty to indemnify or defend the insured for damage if the damage was neither expected nor intended *from the standpoint of the insured*. They do not say from the standpoint of a reasonable person. . . .
>
> . . . . [Therefore,] we must reject the objective or foreseeability standard . . . .

James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278-79 (Ky. 1991) (citations omitted) (emphasis added).

The record discloses no basis for determining which of these two alternatives the Viocks' jury chose in holding S-W liable. The only explicit findings of fact concerning S-W's liability to the Viocks comes from the jury interrogatories, none of which required a finding that S-W actually "expected or intended" Viock's injury. Nor do the jury instructions given in the Viocks' case resolve this fact question in favor of the appellee-insurers:

> Now as I have defined for you during the trial, an intentional tort occurs when one is intentionally doing that which is wrong, or intentionally failing to do that which should be done. The circumstances must also disclose that the Defendant *knew or should have known* that such conduct would probably cause injury to the Plaintiff. . . . Wanton misconduct implies a failure to use any care for the Plaintiff and an indifferance [sic] to the consequences when the probability that harm would result from such failure is great. And such probability is *known or ought to have been known* by the Defendant.

Viock v. Stowe-Woodward Co., No. E-84-27, 1986 WL 3254, at *12-13 (emphasis added) (holding that these instructions adequately convey the law as set forth in *Jones*).

Accordingly, on the record presented, we hold that there is a genuine issue of material fact regarding whether Viock's injuries were actually "expected or intended" from the standpoint of S-W, or whether S-W merely "should have expected" Viock's injury under the *Jones* standard. To the extent that the summary judgments in favor of the appellee-insurers were based on the "expected or intended" clause, those judgments are vacated.

The GCL and E/U insurers place principle reliance on, and the district held that its decision was controlled by, *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987). There, the court held that "[a]n intentional tort allegedly committed by an employer against its employee is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer." *Id.* at 76. *Accord Continental Ins. Co. v. American Shipbuilding Co.*, No. 88-3955, 1989 WL 124304, at *2 (6th Cir. 1989) (unpublished decision, *see* 6th Cir. R. 24(c)) (following *Wedge* and holding that injuries from intentional torts are necessarily "expected or intended"). We do not believe that *Wedge* is controlling.

The Ohio Supreme Court based its decision in *Wedge* on two grounds: (1) that it appeared impossible to have "committed [the] acts with the belief that [the plaintiffs] were substantially certain to be injured, yet not have 'expected' such injuries to occur"; and (2) that "public policy is contrary to insurance against intentional torts." *Wedge*, 509 N.E.2d at 75.

The first ground, the "coextensive" argument, does not apply where, as here, the liability could have been imposed on the grounds that S-W should have been aware of the risk, but without any showing that S-W actually expected or believed that Viock was substantially certain to be injured. Therefore, the *Wedge* court's first ground of decision is inapplicable here.

The "public policy" basis for the decision in *Wedge* was, we believe, the court's dominant concern. At the time *Wedge* was written, any construction of the policy language resulting in coverage would have been nullified by the then-perceived public policy. Thus, the court was not squarely faced with the question of whether *Jones* and the "expected or intended" clause are coextensive. We are convinced that, if the Ohio court were to reexamine this issue in light of the changes in public policy announced in *Harasyn*, the court would determine that the "expected or intended" is limited to instances of *anticipated* effects, *see Thompson*, 491 N.E.2d at 691, and, therefore, is not necessarily coextensive with the scope of liability under *Jones*.

Our conclusion is supported by *Physicians Ins. Co. of Ohio v. Swanson*, 569 N.E.2d 906 (Ohio 1991), the only pronouncement of the Ohio Supreme Court on the applicability of the "expected or intended" clause since *Harasyn*. There, the court limited the application of "expected or intended" clauses to situations in which "the injury itself was expected or intended. It is not sufficient to show merely that the act was intentional." *Id.* at 911. In the Viocks' case, the jury's findings that S-W's *conduct* was intentional are, therefore, irrelevant to the applicability of the clause and the jury instructions permitting recovery regardless of whether S-W actually expected, or merely should have expected, the injuries to Viock, create a genuine issue of material fact as to whether the "expected or intended" clause should apply.

2. WC/EL policies

a. No coverage exists for S-W's Ohio operations

S-W's WC/EL insurers argue that there can be no coverage under the WC/EL policies because those policies do not apply to S-W's operations in Ohio. The district court held that, under the plain language of the policy, Coverage B--the portion of the policy providing Employer's Liability coverage--did apply to the S-W's Ohio operations. We agree.

Coverage B of the WC/EL policies promises:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom.
>
> (a) sustained . . . by any employee of the insured . . . in operations in a state designated in Item 3 of the declarations . . . .

Item three of the declarations states, in its entirety:

> Coverage A of this policy applies to the Workmens' Compensation Law and any Occupational Disease Law of each of the following states: Mass., Georgia, La., Ka., N.C., S.C., Wisc. and N.Y.

There is also an endorsement to the policy, however, entitled "BROAD FORM ALL STATES ENDORSEMENT" which provides, in pertinent part:

> 1. If the insured undertakes operations in any state not designated in Item 3 of the declarations, other than Nevada, North Dakota, *Ohio*, Washington, West Virginia or Wyoming, *Coverage A* applies to such operations.
>
> . . . .
>
> 3. *Coverage B* applies to operations of the insured covered by this endorsement. The limit of liability for bodily injury by disease, including death resulting at any time therefrom, applies *as though each state in which such operations are conducted were designated in Item 3 of the declarations.*
>
> 4. The word "state" as used in this endorsement means *any* State of the United States of America and District of Columbia.
>
> . . . .
>
> 8. All of the provisions of the policy, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

[Emphasis added.]

The WC/EL insurers argue that the application of Coverage B under Paragraph 3 of the endorsement is subject to the same list of excluded states as the application of Coverage A (Workers Compensation Insurance) in

Paragraph 1 of the endorsement. We reject such a strained interpretation.

The plain language of the endorsement, in Paragraphs 4 and 8, shows that, except where otherwise stated, the endorsement extends the full extent of coverage under the main policy to all of S-W's operations in any state in the union. Paragraph 1 limits this extension to by exempting the application of Coverage A (Workers Compensation) to S-W's operations in Ohio. The parties agree that this exemption reflects the fact that, at the time the policy was issued, Ohio's Workers Compensation scheme was monopolistic, i.e. all claims were paid from the state fund, and the purchase of private insurance to cover loss within the Workers Compensations scheme was prohibited by law. *See* Ohio Rev. Code § 4123.82(A).

Paragraph 3, however, which determines the extension of Coverage B (Employers Liability) insurance to "ALL STATES," contains no such restriction or exemption. Rather, it extends Coverage B to the limits of the endorsement, i.e. "ALL STATES," and then specifically provides that the limits of policy coverage apply there "as though each state in which such operations are conducted were designated in Item 3 of the declarations." Thus, Ohio--inasmuch as it is a state "in which such [S-W's] operations are conducted"--is treated as though it were specifically listed in Item 3 of the declarations and, therefore, is included within the coverage provisions of Coverage B. Paragraph 3 of the endorsement contains no express limitations as to the extension of Coverage B and we decline the appellee-insurers' invitation to infer one. In this regard, the decision of the district court is affirmed.

b. Viock's injuries did not arise "out of and in the course of" his employment with S-W

S-W's WC/EL insurers argue that no coverage exists for S-W's liability to the Viocks because, under the terms of the policies, the insurers are only obligated:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease . . .
>
> (a) sustained in the United States of America . . . by any employee of the insured *arising out of and in the course of his employment* . . . . [Emphasis added.]

These insurers contend that an intentional tort by one's employer cannot possibly "arise out of and in the course" of one's employment. The district court found the insurer's argument persuasive and granted summary judgment to the WC/EL insurers on this basis. We disagree.

It is undisputed that Viock's injuries were caused by his long-term exposure to toxic chemicals and congestive dusts *at his work*. But for his job, there is no question that Viock would not have sustained these injuries. It strains credulity, therefore, for the appellee-insurers in this case to contend that these injuries did not "arise out of and in the course of" Viock's employment.

In support of their assertion, the WC/EL insurers cite two Ohio Supreme Court cases, neither of which concerned the construction of an Employers Liability insurance contract. *See Brady v. Safety-Kleen*, 576 N.E.2d 722, 730 (Ohio 1991) (Ohio statute purporting to grant exclusive jurisdiction to an administrative agency to award damages in employer-employee intentional tort cases held unconstitutional); *Blankenship*, 433 N.E.2d at 576 (employer has no immunity from common law causes of action brought by its employees arising out of its own intentional torts).

These cases do not stand for the proposition that, where an employee is injured by his employer's intentional tort, the employee's injuries did not "arise out of and in the course of" his employment within the meaning of that language in an Employers Liability insurance contract. Further, there is both persuasive and controlling Ohio precedent to the contrary.

In *Jones*, the court held that an employee was free to pursue workers compensation benefits for his injury without prejudicing his common law action for intentional tort and, in fact, could recover in both. *Jones*, 472 N.E.2d at 1054-55. Thus, an injury could "arise out of and in the course of" an employee's employment and yet also be the product of his employer's intentional tort. Moreover, in *Harasyn*, the court held that an employer was covered under an Employers Liability insurance policy for liabilities arising out of its intentional torts. The endorsement under which coverage was found contained language substantially similar to that in the WC/EL policies in this case, including the provision that the liability be based upon injuries "arising out of and in the course of [the employee's] employment by the Insured." *Harasyn*, 551 N.E.2d at 963. The court construed this provision and held that, "*[o]n its face*, that coverage reaches the [intentional tort] claims in this case." *Id.* at 966 (emphasis added).

On the basis of *Jones* and *Harasyn*, therefore, we hold that the limitation of coverage under an Employers Liability policy to injuries "arising out of and in the course of" the injured employee's employment means no less and no more than it says: the fact of the employee's employment must be causally related to the injuries. Accordingly, we hold that Viock's injuries "aros[e] out of and in the course of" his employment with S-W. To the extent that the summary judgments in favor of the WC/EL insurers were based upon a contrary conclusion, those judgments are vacated.

III. Individual Insurers

Having resolved these general issues, we turn to the specific arguments raised by each insurer in support of summary judgment on the issue of coverage.

A. Lumbermens

Lumbermens provided three types of policies to S-W: GCL, WC/EL and E/U. The summary judgments with respect to Lumbermens' GCL and E/U policies are vacated on the grounds that genuine issues of material fact remain. *See* Section II.C.1., *supra*.

Lumbermens' first two arguments with respect to its WC/EL policy have been disposed of in Section II.C.2., *supra*. Lumbermens also argues that coverage should be denied because Viock's exposure to the injurious conditions continued beyond the period of time covered by the Lumbermens policies and because notice of S-W's potential loss was not timely in that the Viocks' suit was filed thirty-seven months after the end of Lumbermens' coverage. Because the district court did not reach these issues, and because Lumbermens' ability to raise them is the subject of S-W's waiver and estoppel claims concerning which the district court has deferred judgment, we decline to affirm summary judgment in favor of Lumbermens on this basis. Therefore, that judgment is vacated and we remand this issue, together with the issue of Lumbermens' liability on its GCL and E/U policies, to the district court for further proceedings.

B. Travelers

Travelers issued both GCL and WC/EL policies to S-W. We have rejected Travelers's sole argument in favor of summary judgment on its GCL policy. *See* Section II.C.1., *supra*. This issue, therefore, is remanded for further proceedings.

The first two arguments Travelers raises with respect to its WC/EL policy have also been resolved against it. *See* Sections II.B. and II.C.2.b., *supra*. The Travelers policy limits coverage, as did the policies from Lumbermens, based upon the timing of injuries caused by "accident" and injuries from exposures causing "disease." However, because Travelers has not raised this issue, the question of Travelers' liability under its WC/EL policy is remanded, together with the issue of its liability under its GCL policy, to the district court for further proceedings.

C. Aetna

Aetna provided only WC/EL policies to S-W. Its two "plain language" arguments against coverage have been rejected. *See* Section II.C.2., *supra*. Similarly, Aetna's argument in favor of an implied exclusion for post-issuance changes in the law has also been rejected. *See* Section II.B., *supra*.

Aetna also argues that coverage is precluded under a clause which limits coverage to those employee injuries "for which no benefits are payable under the Workmen's Compensation Laws . . . ." Here, Aetna argues, benefits were payable, and in fact were paid, to Viock and, therefore, there is no coverage. We disagree. S-W's intentional torts are not covered by Ohio's workers compensation laws, and no such benefits are "payable" under those laws. *Blankenship*, 433 N.E.2d at 576. The monies Viock received in 1976 are unrelated to the Viocks' common law claims against S-W in 1981. This point is denied.

For the foregoing reasons, we hold that there are no genuine issues of material fact regarding the question of S-W's coverage for Viock's injuries under the Aetna WC/EL policy in this case.[8] The plain language of that policy provides coverage to S-W. Accordingly, and to the extent not inconsistent with Section II.A.3., *supra*, we reverse the summary judgment in favor of Aetna and remand with instructions for the district court to enter summary judgment for S-W.

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[8] Aetna's policy contains the same restrictions regarding the timing of covered injuries and claims as those in the Lumbermens and Travelers policies. These provisions pose no obstacle to summary judgment against Aetna, however, as its coverage extended beyond the last day of Viock's employment.

D. Weavers

Weavers sold E/U policies to S-W for a period of time running from before Viock's termination to after his filing of the underlying state tort action. Weavers' policies provide excess coverage for only those losses covered by the Aetna WC/EL policies. As noted in the preceding section, this is such a loss. The Weavers policies, however, further limit coverage to losses stemming from "occurrences." As we held in Section II.C.1., *supra*, the applicability of this provision presents an issue of fact and may not be decided on summary judgment. Therefore, we vacate the summary judgment in favor of Weavers and remand this portion of the case to the district court for further proceedings.

E. ELAC

ELAC sold E/U policies to S-W during the period of Viock's employment and injury. ELAC's sole argument against coverage has been rejected in Section II.C., *supra*. Therefore, we vacate the summary judgment in favor of ELAC and remand this portion of the case to the district court for further proceedings.

F. AHAC

AHAC sold E/U policies to S-W during the period of Viock's employment and injury. AHAC's first argument against coverage has been rejected in Section II.C., *supra*. AHAC's second argument is based on a policy endorsement which provides:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants, into or upon land, the atmosphere, or any watercourse or body of water; but this exclusion

does not apply is such discharge dispersal, release or escape is sudden and accidental.

Because it is undisputed that Viock's injuries were caused by his exposure to highly-volatile, toxic cements and solvents as well as various congestive dusts, AHAC argues that the "pollution exclusion" set out above precludes coverage.[7] We disagree.

For the exclusion to apply, its terms require that a "discharge, dispersal, release or escape" of the offending substances occur. A "discharge" is defined as "a flowing or issuing out." To "disperse" is defined as "to cause to breakup and go in different ways"; "to cause to become spread widely." A "release" is defined as "the act of liberating or freeing : discharge from restraint." An "escape" is defined as an "evasion of or deliverance from what confines, limits, or holds." *Webster's Third New International Dictionary* 644, 653, 1917, 774 (1986).

The fumes and dust that injured Viock, it is undisputed, were confined inside S-W's plant and, in fact, were confined to that portion of that plant involved in the gluing process in which Viock worked. It strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to Viock's lungs, had somehow been "discharged, dispersed, released or escaped." Or, considering that the fumes were confined to Viock's work area, that they had been discharged into the "atmosphere," as that word is ordinarily understood. *See Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993) (pollution exception not applicable injuries from exposure to asbestos in confined area rather than "atmosphere"). Without belaboring the obvious, we hold that this exclusion is intended to shield the insurer from the liabilities of the insured to outsiders, either neighboring landowners or governmental entities enforcing environmental laws, rather than injuries caused by toxic substances that are still confined within the area of their intended use.

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[7] We note that this exclusion appears in several of the policies purchased by S-W. To date, however, none of the other insurers have argued its applicability.

AHAC places principle reliance on *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096 (Ohio 1992), *cert. denied*, 113 S. Ct. 1585 (1993). *Hybud*, in our view, while primarily concerned with the "sudden" exception to this exclusion, actually supports our reading of this clause. There, the insured, a former owner of a landfill and transporter of waste material, was sued by a neighboring land owner, the United States Environmental Protection Agency and the State of Ohio. Thus, the application of the exclusion was so obvious that it was not even discussed. Rather, attention focused on the plain meaning of the words "sudden and accidental."

Accordingly, we hold that Ohio courts would limit the use of this exclusion to its plain language and obvious purpose. Therefore, the issue of AHAC's liability on its E/U policies is remanded to the district court for further proceedings regarding the applicability of the "expected or intended" clause.

G. Youell

Youell issued a series of Work-in-Progress policies (WIP's). These policies are in two parts: (1) an "all-risk" policy covering all materials and work-in-progress; and (2) a general liability policy providing:

> To cover the legal liabilities of the Assured world wide to Third Parties and/or other interests in respect of loss of life and/or personal injury and/or damage to property and/or other liabilities howsoever and wheresoever arising in connection with their business . . . including legal liabilities arising out of any fault or defect . . . or arising in any other circumstance howsoever . . . .

Excluding liabilities arising under -

(a) Road Traffic Acts or equivalent foreign legislation.

(b) Any Employers' Liability or Workmen's Compensation legislation.

As we have repeatedly noted, S-W's liability to the Viocks arose under the common law and specifically did not, and could not, arise under Ohio's workers compensation scheme. *Blankenship*, 433 N.E.2d at 576. Therefore, Youell's protestations to the contrary notwithstanding, we hold that neither of the two express exclusions contained in the WIP policy preclude coverage.

The district court granted summary judgment in favor of Youell on the ground that, because the WIP policies were issued prior to the *Blankenship* decision, such liabilities could not have been contemplated. As we held in Section II.B., *supra*, we reject this argument.

Accordingly, and to the extent not inconsistent with Section II.A.3., *supra*, we reverse the summary judgment in favor of Youell and remand with instructions for the district court to enter summary judgment in favor of S-W.

IV.

For all of the foregoing reasons, we rule as follows:[8]

1. To the extent of the Viocks' $2,500,000 punitive damages award, all the summary judgments entered in favor of the insurers are **AFFIRMED**.

2. In all other respects, however, the summary judgments entered in favor of the insurers are **VACATED**.

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[8] This opinion constitutes the unanimous view of the court as to all sections, with the exception of Section II.C.1., from which Judge Ryan dissents, and Section II.C.2.a, from which Judge Joiner dissents.

3. The case is **REMANDED** to the district court with directions that summary judgment be entered in favor of S-W on the issue of coverage under the Aetna and Youell policies, and for further proceedings regarding the issue of coverage under the remaining Lumbermens, Travelers, Weavers, ELAC and AHAC policies.

RYAN, Circuit Judge, concurring in part and dissenting in part. Although I concur in much of what is said in the majority opinion, I do not agree that the district court's award of summary judgment to the GCL and E/U insurers must be reversed. The majority opinion holds that there is a question of fact whether S-W Industries acted with knowledge that injury to Viock "was substantially certain to occur." I do not believe this conclusion is supported by Ohio law, or by the law of the case.

In Ohio, an employer is immune from liability for workplace injuries, absent a finding that it committed an intentional tort. *Blankenship v. Cincinnati Milacron Chem., Inc.*, 433 N.E.2d 572, 575-77 (1982). This intentional tort exemption to workers compensation exclusivity encompasses those acts "committed with intent to injure another, or committed with belief that such injury is substantially certain to occur." *Jones v. VIP Development Co.*, 472 N.E.2d 1046, 1046 (Ohio 1984).

In *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987), the Ohio Supreme Court held that an employer's intentional tort, as defined in *Jones*, could not be covered by GCL policy language identical to that here, because the policy excluded expected or intended injuries, and, by definition, work-related intentional tort injuries are expected or intended. The majority maintains, however, that *Wedge* does not control this case, apparently on the theory that in equating "expected or intended" injuries with the belief that injuries are "substantially certain to occur," the *Wedge* court did not have in mind situations where the employer should have, but may not have known that injury was substantially certain to follow. And Viock's jury, the majority correctly observes, found S-W liable for intentional tort upon an instruction that permitted the verdict if the jury found that the risks to Viock merely "should have been known." According to the majority, this is not the kind of intentional tort that is the equivalent of an "expected or intended" injury that the *Wedge* court held would preclude insurance coverage.

In my view, that is not a correct reading of *Wedge*. That court did not condition its ruling on a finding that the employer-insured had acted with knowledge that injury was substantially certain to occur, or with any other specific state of mind. There were no findings of fact in *Wedge*. Rather, the case was a declaratory judgment action brought by the insurer, who was arguing that it had no duty to defend a work-related intentional tort action because its policy excluded coverage for expected or intended injuries. Thus, the court was expressing a general rule that work-related intentional torts are necessarily expected or intended, and therefore not covered by policies excluding expected or intended injuries.

The majority opinion also contends that the *Wedge* decision was really driven by public policy concerns, now obviated by subsequent court decisions. It is difficult to discern the basis for this conclusion. Only after concluding that there was no "possibility of coverage" did the court mention "public policy," and then only in the categorical statement that "public policy is contrary to insurance against intentional torts." *Id.* at 76.

The Ohio Court of Appeals expressly held that the *Viock* trial court's "knew or should have known" instruction was sufficient to support an intentional tort verdict because it was synonymous with the "substantial certainty" language of *Jones*. *Viock v. Stowe-Woodward Co.*, No. E-84-27, 1986 WL 3254, slip op. at 14 (Ohio App. 1986). That being so, the intentional tort liability imposed on S-W is precisely within the *Jones* definition of work-related intentional tort that *Wedge* holds "is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer." *Wedge*, 509 N.E.2d at 76. It is indisputable, I think, that under Ohio law injuries that are a "substantial certainty" are "expected or intended." I would affirm the district court's summary judgment for the GCL and E/U insurers. Otherwise, I concur in the majority opinion.

CHARLES W. JOINER, Senior District Judge, concurring in part and dissenting in part. Although at first blush *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987), appears to provide a solution to the intentional tort coverage problem in this case, the opinion by Judge Suhrheinrich makes clear that *Wedge* should be distinguished. The opinion also makes clear that Ohio's developing law in this area does not support a reading of *Wedge* that would deny coverage. Our task is to make our best effort in finding and applying Ohio law. Judge Suhrheinrich's opinion reaches the result most likely to be reached if this case were to be decided by the Ohio court. For these reasons, I join in Part II.C.1. of the opinion.

I part company with Judge Suhrheinrich in his analysis of the geographical scope of the coverage afforded by the Aetna and Lumbermens WC/EL policies, specifically, the construction in Part II.C.2.a. of the opinion of the Broad Form All States Endorsement. Both policies include standard form, identical versions of this endorsement.

To discern the meaning of the All States Endorsement, I start with the basic insuring agreement. The WC/EL policies at issue have both Coverage A, pertaining to benefits payable under workers' compensation laws, and Coverage B, entitled "Employer's Liability." The declaration pages of the policies state in item 3 that Coverage A applies to the listed states, and no policy includes Ohio. The policies further provide that Coverage B exists as to operations of the insured in the states listed in item 3 of the declarations.

The All States Endorsement provides:

> 1. If the insured *undertakes operations in any state not designated in Item 3* of the declarations, *other than . . . Ohio* [and five other states], Coverage A applies *to such operations*.

(Emphasis added.) Like in the basic insuring agreement, the scope of Coverage B under the All States Endorsement tracks the scope of Coverage A:

> 3. Coverage B applies to *operations of the insured covered by this endorsement.* The limit of liability for bodily injury by disease, including death resulting at any time therefrom, applies as though each state *in which such operations are conducted* were designated in Item 3 of the declarations.

(Emphasis added.) The term "this endorsement" clearly applies to the single endorsement entitled "All States Endorsement," and embodies all of the limitations in that endorsement. Two conclusions flow from this language: (1) the endorsement limits itself to *operations outside Ohio* and five other states; and (2) Coverage B is limited to *operations of the insured covered by this endorsement*. The only rational conclusion is that the endorsement was intended *not* to cover Ohio.[1]

If this were the only provision regarding the geographical scope of the coverage afforded by the WC/EL policies, then coverage would not exist as to either of the Lumbermens or Aetna policies. However, Aetna has an additional endorsement that provides coverage for the loss at issue here.

Aetna's Employers' Overhead Endorsement provides that the insurance afforded under Coverage B also applies to bodily injury by accident *or* disease sustained by an employee of the insured, employed in one of the designated states, *including Ohio*, arising out of and in the course of his employment by the insured, "but only with respect to . . . [s]uch injury or death for which no benefits are payable under the Workmen's Compensation Laws of such state[.]" As we hold in Part III.C. of the opinion, Aetna does not benefit from this limitation on coverage, because workers' compensation benefits were not payable to Carl Viock for his intentional tort injury.

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[1] The opinion relies on paragraphs 4 and 8 of the endorsement, but these provisions do not provide guidance one way or the other as to geographical scope of Coverage B. Paragraph 4 simply defines the word "state" (in contrast to, *e.g.*, Puerto Rico and Canadian provinces), and does not purport to enumerate *which* states are covered. Paragraph 8 simply makes all other consistent provisions of the policy applicable to the insurance provided by the endorsement.

Thus, I agree that S-W is entitled to entry of summary judgment against Aetna. Unlike Judge Suhrheinrich, however, I do not base this conclusion on the All States Endorsement but, rather, on the Employers' Overhead Endorsement. The very existence of the Employers' Overhead Endorsement supports the conclusion that the All States Endorsement does not provide coverage. Significantly, the states *ex*cluded by the All States Endorsement are *in*cluded in the Employers' Overhead Endorsement (except West Virginia, which is excluded from both). The opinion's reading of the All States Endorsement renders the Employers' Overhead Endorsement a nullity.

My view of the All States Endorsement would have a practical effect only on the disposition of Lumbermens' appeal. Thus, I concur in the result reached as to Aetna, and dissent, for the reasons stated, with respect to the disposition of Lumbermens' liability on its WC/EL policies only.

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0112A (6th Cir.)
File Name: 94a0112a.06

Nos. 92-4182/4212

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUMBERMENS MUTUAL CASUALTY COMPANY,
Plaintiff-Appellee, Cross-Appellant,

v.

S-W INDUSTRIES, INC.,
Defendant-Appellant, Cross-Appellee,

AETNA CASUALTY & SURETY COMPANY; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.; THE TRAVELERS INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; YOUELL & COMPANIES; J.F. GREEN & OTHERS; H.S. WEAVERS AGENCIES, LTD.; UNDERWRITERS AT LLOYDS, LONDON,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

AMENDED OPINION

Decided and Filed April 7, 1994

Before: RYAN and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge.[*]

SUHRHEINRICH, Circuit Judge, delivered the opinion of the court. RYAN, Circuit Judge (pp. 29-30) and JOINER, Senior District Judge (pp. 31-33), delivered separate opinions concurring in part and dissenting in part.

SUHRHEINRICH, Circuit Judge. Lumbermens Mutual Casualty Company (Lumbermens) filed suit seeking a declaratory judgment as to its obligations under certain insurance policies issued to S-W Industries, Inc. (S-W). Because they also had issued various policies to S-W, Lumbermens named as defendants Aetna Casualty & Surety Company (Aetna), Employers' Liability Assurance Corporation, Ltd. (ELAC), The Travelers Insurance Company (Travelers), American Home Assurance Company (AHAC), National Union Fire Insurance Company (NUFIC),[1] Youell & Company (Youell); J.F. Green & Others (Green); H.S. Weavers Agencies, Ltd. (Weavers)

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[*] The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The district court granted summary judgment to National Union Fire Insurance Company on the ground that S-W had failed to show it had purchased a policy from that insurer. S-W does not challenge this judgment on appeal.

(collectively, "appellee-insurers"). The district court granted summary judgment to each of the insurers on the grounds that the judgment for which S-W seeks indemnification did not come within the coverage provisions of, or fell within exclusions to, each of the various insurance policies. S-W appeals and Lumbermens cross-appeals. We have jurisdiction, 18 U.S.C. § 1332(a)(1); Fed. R. Civ. P. 54(b), and now **AFFIRM**, in part, and **VACATE**, in part, and **REMAND** this case to the district court for further proceedings.

I.

Carl Viock, an employee of S-W from 1968 to 1981, worked cementing strips of rubber onto rotating drums. As a result, he was continually exposed to the fumes from highly-volatile, toxic cements and solvents as well as various congestive dusts created by the plant's rubber fabricating processes. In 1976, Viock was hospitalized and diagnosed with pneumonia caused by his continual exposure to chemicals at work. Upon his release, Viock returned to work with his doctor's restriction that he work only in a chemical-free and dust-free environment. S-W contended that no such environment existed at its plant and Viock, facing unemployment, had his doctor remove the restriction. Viock returned to his job and continued to suffer symptoms of his lung disease. Each day, Viock spent his lunch hour connected to an IPPB, a machine used to clear his congested lungs and aid his breathing. Viock's manager at the plant even suggested that Viock bring the IPPB to work so that he would not have to leave the plant during his lunch hour.

Upon his return to work, Viock sought and received benefits under Ohio's Workers Compensation scheme. Union representatives also requested that Viock's work area be ventilated with exhaust fans. S-W responded by offering Viock a respirator and by installing a portable fan near Viock. Nevertheless, by 1981, Viock's condition had worsened and S-W requested that he be examined by the company's physician. The physician concluded that Viock's lung condition had progressed to the point that he could no longer be productive in his job and, accordingly, Viock was terminated on June 1, 1981.

Eight months later, Viock sued S-W alleging that S-W "fraudulently, intentionally and/or maliciously disguised working conditions and/or concealed from [him] and his physician material information and warnings concerning the toxic substances to which [he] was continuously and repeatedly exposed." Mrs. Viock also sued for her loss of consortium stemming from the injuries to her husband. A jury returned compensatory damage awards in favor of the Viocks in the amount of $1,150,000 and assessed punitive damages against S-W in the amount of $2,500,000. The Ohio Court of Appeals affirmed, in full, the Viocks' awards. S-W claims, and it is not disputed, that it has paid this judgment.

In 1986, Lumbermens filed this action seeking a declaratory judgment regarding its liability under certain insurance policies sold to S-W for the sums S-W paid to the Viocks. Lumbermens also named as defendants S-W's other insurers that had policies in force during the applicable period. All parties moved for summary judgment on the question of coverage. The district court granted summary judgment to each of the insurers on the grounds that no coverage existed under any of the various policies at issue and, pursuant to Federal Rule of Civil Procedure 54(b), certified these judgments as final for purposes of this appellate review. Notices of appeal and cross-appeal were timely filed.

II.

As there are seven appellee-insurers raising some thirty or more points in affirmance of the district court's decision, the needs of clarity and organization demand that certain overarching issues be resolved first. Then, applying the resolution of these issues, the liability of each insurer is considered in turn.

A. Public Policy

The appellee-insurers contend that, even if their policies can be read to provide coverage for S-W's liability to the Viocks, the public policy of Ohio forbids the enforcement of those provisions on the grounds that an intentional tortfeasor may not seek indemnification through insurance. The Viocks' cause of action, they argue, was based on S-W's intentional torts and, therefore, the judgment which resulted must be borne by S-W alone.

Based upon the Ohio Supreme Court's interpretation of that state's public policy, we hold that Ohio law does not prohibit indemnification of the $1,150,000 that S-W paid in compensatory damages. Ohio public policy does prohibit, however, any indemnification of the $2,500,000 punitive damage award and, to that extent, the district court's grants of summary judgment in favor of the insurers in this case are affirmed.

1. The Viocks' claim

To address the appellee-insurer's assertions of Ohio public policy, we must first review the nature of the Viocks' cause of action against S-W. Viock's injuries undisputedly occurred in the workplace and, ordinarily, compensation for such injuries is restricted in Ohio to an award of workers compensation benefits. *See* Ohio Const. art. II, § 35; Ohio Rev. Code Ann. § 4123.74 (Anderson). The Ohio Supreme Court, however, has recognized that Ohio's workers compensation scheme provides no immunity for an employer's *intentional* torts against its employees. Thus, where an employee's injuries are the product of his employer's intentional torts, recovery may be sought under the common law. *Blankenship v. Cincinnati Milacron Chems.*, 433 N.E.2d 572, 576 (Ohio 1982).

In the context of employer intentional torts, it was necessary to define what actions by employers, other than those taken with the subjective purpose of injuring a specific employee, would be considered to have been "intentionally" tortious. The Ohio Supreme Court first addressed this issue in *Jones v. VIP Development Co.*, 472 N.E.2d 1046 (Ohio 1984). The court stated:

> [A] specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain, not merely likely, to occur. It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct.

Id. at 1051. Thus, the common law element of "intent" encompasses (1) direct intent--a desire or purpose to cause a particular result, and (2) presumed intent--proceeding in the face of a risk that a particular result is substantially certain to occur. The court in *Jones* held that allegations that an employer "knew or should have known" of a very great risk of injury were sufficient to state a cause of action. *Id.* at 1051-52. Though *Jones* was not decided until after the trial in the Viocks' case, the Ohio Court of Appeals applied *Jones* in determining that the instructions given the jury in that case adequately stated the law of intentional torts. *Viock v. Stowe-Woodward Co.*, No. E-84-27, 1986 WL 3254, at *9-11 (Ohio Ct. App. 1986).

The appellee-insurers, in invoking Ohio's public policy, assert that S-W was found liable for acts committed with "direct intent" within the framework just discussed. The district court, however, determined that the basis for the jury's awards was S-W's "presumed intent." We agree.

The jury in the Viocks' case was specifically instructed that it need not believe that S-W had a specific intent to injure Carl Viock to hold S-W liable for his injuries. Rather, the jury was instructed on both the "direct" and "presumed" categories of intentional torts. The appellee-insurers argue that the jury had to have believed that S-W acted with "direct intent" because it awarded punitive damages. The question of punitive damages, however, was argued to the jury on the basis that S-W had "reckless[ly] disregard[ed] the rights of another," not on the basis that it was S-W's purpose to injure Viock.

In lieu of a general verdict form, the jury in the Viocks' state-court trial responded to fifteen special interrogatories. The second interrogatory, answered in the affirmative by all eight jurors, asked: "Do you find by a preponderance of the evidence that Stowe-Woodward Company's intentional *conduct* injured Carl Viock?" [Emphasis added.] In awarding $2,500,000 in punitive damages, the jury responded to the seventh interrogatory which asked: "If you find that Stowe-Woodward Company's intentional *conduct* injured Carl Viock, what punitive damages, if any, do you award the Plaintiff?" [Emphasis added.] Twice more, the jury was asked for findings based upon S-W's intentional conduct. The jury was not asked to find that S-W had, as its purpose, to injure Viock, nor do any of the jury's responses justify such an inference.

Based upon the Viocks' complaint, the arguments of counsel, the trial judge's instructions and, most importantly, the jury's responses to special interrogatories, we believe that the Viocks' recovery was premised on this second category--"presumed intent."

2. Indemnification of compensatory damages

Thus, the question becomes whether Ohio's public policy forbids an employer from insuring against liabilities arising from those acts taken where the employer knew or should have known of a risk that injury to an employee was substantially certain to occur. This question was squarely addressed in *Harasyn v. Normandy Metals, Inc.*, 551 N.E.2d 962 (Ohio 1990). There, the court rejected any "blanket prohibition" and held that the "better view is to prohibit insurance only for those intentional torts where the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character." *Id.* at 965 (quotation marks omitted). The court concluded that, while the presence of insurance may encourage those who commit "direct intent" intentional torts, "public policy does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur." *Id.* at 965-66.

Accordingly, we hold that Ohio public policy does not bar indemnification of S-W's liability to the Viocks arising out of their $1,150,000 compensatory damages awards.

3. Indemnification of punitive damages

The issue of whether S-W may seek coverage for the $2,500,000 in punitive damages paid to the Viocks, however, is substantially different. In *Harasyn*, the court noted that "because punitive damages are awarded to punish and deter the tortfeasor rather than to compensate the victim, there is a much different and stronger public policy interest against insurance coverage which would indemnify the tortfeasor against punitive damages." *Harasyn*, 551 N.E.2d at 965 n.3. To date, the Ohio Supreme Court has not ruled directly on the question of whether Ohio's public policy forbids the indemnification of punitive damage awards. The Ohio Court of Appeals, however, has held that such coverage would violate Ohio public policy. *Casey v. Calhoun*, 531 N.E.2d 1348, 1351 (Ohio Ct. App. 1987).

Therefore, we think it clear, and now hold, that Ohio law prohibits the indemnification of monies paid pursuant to an award of punitive damages arising out of the insured's own conduct. The district court's summary judgments in favor of the insurers, to the extent of the $2,500,000 punitive damage award, are affirmed.

B. Implied Exclusion for Changes in the Common Law

Most, if not all, of the appellee-insurers argue that, because the policies at issue were sold to S-W prior to the Ohio Supreme Court's 1982 decision in *Blankenship*, those policies cannot now be construed to cover liabilities flowing from an intentional tort suit brought under *Blankenship*. In essence, they urge this court to imply an exception to the broadly worded grants of coverage to the effect that no liability is covered unless it could have been imposed as of the date the policy was issued. The district court found the insurers' argument persuasive and granted summary judgment to the insurers on that basis. We disagree.

The only Ohio authorities cited by the appellee-insurers in support of their argument are *Home Indemnity Co. v. Village of Plymouth*, 64 N.E.2d 248 (Ohio 1945), and *Howe v. Crumley, Jones & Crumley Co.*, 57 N.E.2d 415, 418-19 (Ohio Ct. App. 1944). These cases, the appellee-insurers contend, stand for the proposition that an insurance contract "freezes in time" the scope of the insured's liabilities for which coverage is provided. We are unpersuaded.

In *Home Indemnity*, 64 N.E.2d at 250-51, the court, faced with an ambiguity in an insurance policy's exclusions, looked to the circumstances surrounding the purchase of the policy to determine the parties' intent. The case does not involve a post-issuance change in the law regarding the village's liability to its employees. Instead, it is a straightforward application of the basic rules of insurance contract interpretation. Similarly, *Howe*, 57 N.E.2d at 418, fails to support the appellee-insurer's contention because the issue, again, was the parties' intent, not a post-issuance change in the law.

We reject the appellee-insurers' argument because it runs contrary to the settled law of insurance. In discussing the risks ordinarily transferred by a liability insurance policy, a leading treatise uses the example of a motor vehicle liability policy:

> Even if the accident occurs in a jurisdiction in which there is a judicial precedent that limits or precludes any liability to the spouse of an injured person, there is *still the possibility that this precedent will be overturned*. This *uncertainty* is *also* within the bundle of risks that is *transferred* to the insurer by the . . . policy.

Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 9 (1988) (emphasis added).

Here, the broad coverage provisions in S-W's insurance contracts, though issued prior to the *Blankenship* decision, may fairly be read to cover this type of liability and the insurers have not established a contrary intent. The policies in question are, for the most part, multi-state policies intended to cover S-W's operations in many states. At the time these policies were issued, at least some states allowed intentional tort claims by an employee against his employer. *See Blankenship*, 433 N.E.2d at 576-77, nn.8-9, 11 (citing cases from Minnesota, New York, Massachusetts, and West Virginia from as far back as 1930). Thus it cannot be said that such liabilities were not foreseeable at the time these policies were issued to S-W.

Nor are we convinced that the *Blankenship* decision amounted a to "change" in the law in the way that the appellee-insurers describe. A cause of action for intentional tort is not new. The most that can be said is that, for the period between the advent of workers compensation and *Blankenship*, employers who committed intentional torts against their employees thought they enjoyed, and during this time many of the lower courts of Ohio provided, immunity from such suits at common law. *Blankenship* did not "invent" or "recognize" a cause of action or "revoke" any employer's immunity, as the appellee-insurers contend.

It merely disabused employers (and their insurance companies) of the idea that Ohio's constitution or its workers compensation laws provided any immunity from intentional tort suits. In *Blankenship*, three judges of the Ohio Supreme Court specifically pointed out that "[t]his court has never yet ruled that an employer may intentionally harm an employee and remain immune to civil suit." *Blankenship*, 433 N.E.2d at 579 (Clifford Brown, J., concurring). Such suits have always existed at common law and, absent an unequivocal intent in the statute or constitution to abrogate it, "the common law right of action against an employer . . . for intentional torts *remains*." *Id.* (emphasis added).

Therefore, we hold that these insurers may not avoid coverage, where the plain language of their policies clearly provides it, on the basis that a suit such as the Viocks' probably, although not certainly, would not have been successful at the time the policies were issued.

C. Plain Language Arguments

S-W's various policies can be classified into four general categories: (1) Comprehensive General Liability policies (GCL's); (2) Workers Compensation and Employers Liability policies (WC/EL's); (3) Excess or Umbrella Liability policies (E/U's); and (4) Work-in-Progress policies (WIP's). Each of the insurers make "plain language" arguments to the effect that no coverage for S-W's liabilities exists. These arguments are considered in turn.

1. GCL and E/U policies

The GCL and E/U insurers contend that no coverage exists because the plain language of their policies limits coverage to those injuries "caused by or arising out of an occurrence." An "occurrence" is defined as "an event, including continuous or repeated exposure to conditions which result in Personal Injury or Property Damage *neither* *expected nor intended from the standpoint of the insured.*"[2] [Emphasis added.] The insurers argue that injuries resulting from an intentional tort must, by definition and in every case, be "expected or intended" and are, therefore, not the product of an "occurrence." The district court agreed and granted summary judgment to these insurers on this basis.

After reviewing Ohio law, we are not persuaded that the Ohio courts would, as a matter of law and in every case, exclude coverage under an "expected or intended" clause for every liability arising out of an employer's intentional torts. We hold, instead, that the question of whether S-W "expected or intended" Viock's injuries is a question of fact. We further hold that this fact question is not coextensive with, and therefore is not determined by, whether S-W's conduct was found to constitute an "intentional" tort under the law of Ohio at the time of the Viocks' trial. Because the record raises a genuine issue as to this material question of fact, the summary judgments of the district court on these grounds are vacated.

The Ohio Supreme Court has stated that the purpose of the "expected or intended" clause is to "prevent[] individuals from purchasing insurance as a shield for their *anticipated* intentional conduct." *Preferred Mut. Ins. Co. v. Thompson*, 491 N.E.2d 688, 691 (Ohio 1986) (emphasis added). The clause seeks to preserve the element of "fortuity"; a "fundamental principle" of insurance law. *See* Keeton & Widiss, *Insurance Law* § 5.3(a), at 475. To allow an insured to be indemnified for anticipated losses, the Ohio Supreme Court noted, would render an insurance company's risk "incalculable" and, therefore, liability policies rightfully exclude such losses. *Thompson*, 491 N.E.2d at 691.

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[2] While the precise language of any one particular policy may vary from that just quoted, the variations are immaterial to our analysis and, for ease of discussion, are disregarded.

The aim of the common law of intentional torts, however, encompasses a somewhat broader range of losses. There, an actor is held responsible for those results he purposefully causes and, in addition, those results that were so substantially certain to flow from his acts that the law should presume those results to have been "intended." In *Jones*, the Ohio Supreme Court rejected the idea that an employee must show that it was his employer's purpose to injure him in order to recover in tort. Rather the court held that the law of intentional torts also condemns actions of an employer taken "with the belief that such injury is substantially certain to occur." *Jones*, 472 N.E.2d at 1051. The focus in *Jones*, however, was not the employer's actual belief but rather the near-certainty of the risk. *See Jones*, 472 N.E.2d at 1051-52 (holding plaintiffs' complaint alleging that employer "knew or should have known" to be a "sufficient allegation of intentional misconduct").[3]

Thus, in the Viocks' case, decided under *Jones*, S-W could have been found liable for an intentional tort on either of two grounds: (1) that it had acted in the face of a very great risk that injury to Viock would occur, a risk of which S-W was *actually* aware; or (2) that it had acted in the face of a very great risk that injury to Viock would occur, a risk of which S-W was not aware but of which it *should have been* aware. Under the first alternative, it would appear that coverage is precluded by the "expected or intended" clause in that the injury to Viock could fairly be said to have been expected.[4] Under the second alternative, however, coverage is not precluded because the clause, by its own terms, excludes only injuries expected or intended "from the standpoint of the insured" and, therefore, does not extend to injuries the insured "should have expected," but did not actually and subjectively expect.[5]

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[3] In *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489 (Ohio 1988), the Ohio Supreme Court revisited, with the express purpose of "significantly limiting" the holding of *Jones*. *Id.* at 504. To recover, the court held that an employee must prove that (1) the employer had *actual* knowledge of "the existence of a danger[] . . . within his business operation," and (2) that the employer had *actual* knowledge that, "harm to [the employee] would be a substantial certainty . . . ." *Id.*

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[4] Thus, under *Fossen*'s requirement of actual knowledge, intentional tort liability would be coextensive with the "expected or intended" clause in the GCL policies. S-W's liability, however, arose under the more-inclusive *Jones* standard.

It should also be noted that *Fossen*, as written, is not even the law in Ohio today. The pendulum reversed course again in *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108, 1111-12 (Ohio 1991), when the Ohio Supreme Court eased *Fossen*'s strict requirements and permitted liability even without a showing of actual knowledge that the employee's injuries were substantially certain to occur.

[5] With respect to this issue, the Kentucky Supreme Court recently stated:

> The "expected or intended" exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim. . . . We believe this to be the majority rule, and we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury was intentional and the injury foreseeable. . . .
>
> . . . .
>
> . . . . The policies here state that the insurer has a duty to indemnify or defend the insured for damage if the damage was neither expected nor intended *from the standpoint of the insured*. They do not say from the standpoint of a reasonable person. . . .
>
> . . . . [Therefore,] we must reject the objective or foreseeability standard . . . .

James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278-79 (Ky. 1991) (citations omitted) (emphasis added).

The record discloses no basis for determining which of these two alternatives the Viocks' jury chose in holding S-W liable. The only explicit findings of fact concerning S-W's liability to the Viocks comes from the jury interrogatories, none of which required a finding that S-W actually "expected or intended" Viock's injury. Nor do the jury instructions given in the Viocks' case resolve this fact question in favor of the appellee-insurers:

> Now as I have defined for you during the trial, an intentional tort occurs when one is intentionally doing that which is wrong, or intentionally failing to do that which should be done. The circumstances must also disclose that the Defendant *knew or should have known* that such conduct would probably cause injury to the Plaintiff. . . . Wanton misconduct implies a failure to use any care for the Plaintiff and an indifferance [sic] to the consequences when the probability that harm would result from such failure is great. And such probability is *known or ought to have been known* by the Defendant.

Viock v. Stowe-Woodward Co., No. E-84-27, 1986 WL 3254, at *12-13 (emphasis added) (holding that these instructions adequately convey the law as set forth in *Jones*).

Accordingly, on the record presented, we hold that there is a genuine issue of material fact regarding whether Viock's injuries were actually "expected or intended" from the standpoint of S-W, or whether S-W merely "should have expected" Viock's injury under the *Jones* standard. To the extent that the summary judgments in favor of the appellee-insurers were based on the "expected or intended" clause, those judgments are vacated.

The GCL and E/U insurers place principle reliance on, and the district held that its decision was controlled by, *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987). There, the court held that "[a]n intentional tort allegedly committed by an employer against its employee is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer." *Id.* at 76. *Accord Continental Ins. Co. v. American Shipbuilding Co.*, No. 88-3955, 1989 WL 124304, at *2 (6th Cir. 1989) (unpublished decision, *see* 6th Cir. R. 24(c)) (following *Wedge* and holding that injuries from intentional torts are necessarily "expected or intended"). We do not believe that *Wedge* is controlling.

The Ohio Supreme Court based its decision in *Wedge* on two grounds: (1) that it appeared impossible to have "committed [the] acts with the belief that [the plaintiffs] were substantially certain to be injured, yet not have 'expected' such injuries to occur"; and (2) that "public policy is contrary to insurance against intentional torts." *Wedge*, 509 N.E.2d at 75.

The first ground, the "coextensive" argument, does not apply where, as here, the liability could have been imposed on the grounds that S-W should have been aware of the risk, but without any showing that S-W actually expected or believed that Viock was substantially certain to be injured. Therefore, the *Wedge* court's first ground of decision is inapplicable here.

The "public policy" basis for the decision in *Wedge* was, we believe, the court's dominant concern. At the time *Wedge* was written, any construction of the policy language resulting in coverage would have been nullified by the then-perceived public policy. Thus, the court was not squarely faced with the question of whether *Jones* and the "expected or intended" clause are coextensive. We are convinced that, if the Ohio court were to reexamine this issue in light of the changes in public policy announced in *Harasyn*, the court would determine that the "expected or intended" is limited to instances of *anticipated* effects, *see Thompson*, 491 N.E.2d at 691, and, therefore, is not necessarily coextensive with the scope of liability under *Jones*.

Our conclusion is supported by *Physicians Ins. Co. of Ohio v. Swanson*, 569 N.E.2d 906 (Ohio 1991), the only pronouncement of the Ohio Supreme Court on the applicability of the "expected or intended" clause since *Harasyn*. There, the court limited the application of "expected or intended" clauses to situations in which "the injury itself was expected or intended. It is not sufficient to show merely that the act was intentional." *Id.* at 911. In the Viocks' case, the jury's findings that S-W's *conduct* was intentional are, therefore, irrelevant to the applicability of the clause and the jury instructions permitting recovery regardless of whether S-W actually expected, or merely should have expected, the injuries to Viock, create a genuine issue of material fact as to whether the "expected or intended" clause should apply.

2. WC/EL policies

a. No coverage exists for S-W's Ohio operations

S-W's WC/EL insurers argue that there can be no coverage under the WC/EL policies because those policies do not apply to S-W's operations in Ohio. The district court held that, under the plain language of the policy, Coverage B--the portion of the policy providing Employer's Liability coverage--did apply to the S-W's Ohio operations. We agree.

Coverage B of the WC/EL policies promises:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom.
>
> (a) sustained . . . by any employee of the insured . . . in operations in a state designated in Item 3 of the declarations . . . .

Item three of the declarations states, in its entirety:

> Coverage A of this policy applies to the Workmens' Compensation Law and any Occupational Disease Law of each of the following states: Mass., Georgia, La., Ka., N.C., S.C., Wisc. and N.Y.

There is also an endorsement to the policy, however, entitled "BROAD FORM ALL STATES ENDORSEMENT" which provides, in pertinent part:

> 1. If the insured undertakes operations in any state not designated in Item 3 of the declarations, other than Nevada, North Dakota, *Ohio*, Washington, West Virginia or Wyoming, *Coverage A* applies to such operations.
>
> . . . .
>
> 3. *Coverage B* applies to operations of the insured covered by this endorsement. The limit of liability for bodily injury by disease, including death resulting at any time therefrom, applies *as though each state in which such operations are conducted were designated in Item 3 of the declarations*.
>
> 4. The word "state" as used in this endorsement means *any* State of the United States of America and District of Columbia.
>
> . . . .
>
> 8. All of the provisions of the policy, insofar as such provisions are not inconsistent herewith, are applicable to the insurance afforded by the policy by virtue of this endorsement.

[Emphasis added.]

The WC/EL insurers argue that the application of Coverage B under Paragraph 3 of the endorsement is subject to the same list of excluded states as the application of Coverage A (Workers Compensation Insurance) in

Paragraph 1 of the endorsement. We reject such a strained interpretation.

The plain language of the endorsement, in Paragraphs 4 and 8, shows that, except where otherwise stated, the endorsement extends the full extent of coverage under the main policy to all of S-W's operations in any state in the union. Paragraph 1 limits this extension to by exempting the application of Coverage A (Workers Compensation) to S-W's operations in Ohio. The parties agree that this exemption reflects the fact that, at the time the policy was issued, Ohio's Workers Compensation scheme was monopolistic, i.e. all claims were paid from the state fund, and the purchase of private insurance to cover loss within the Workers Compensations scheme was prohibited by law. *See* Ohio Rev. Code § 4123.82(A).

Paragraph 3, however, which determines the extension of Coverage B (Employers Liability) insurance to "ALL STATES," contains no such restriction or exemption. Rather, it extends Coverage B to the limits of the endorsement, i.e. "ALL STATES," and then specifically provides that the limits of policy coverage apply there "as though each state in which such operations are conducted were designated in Item 3 of the declarations." Thus, Ohio--inasmuch as it is a state "in which such [S-W's] operations are conducted"--is treated as though it were specifically listed in Item 3 of the declarations and, therefore, is included within the coverage provisions of Coverage B. Paragraph 3 of the endorsement contains no express limitations as to the extension of Coverage B and we decline the appellee-insurers' invitation to infer one. In this regard, the decision of the district court is affirmed.

b. Viock's injuries did not arise "out of and in the course of" his employment with S-W

S-W's WC/EL insurers argue that no coverage exists for S-W's liability to the Viocks because, under the terms of the policies, the insurers are only obligated:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease . . .
>
> (a) sustained in the United States of America . . . by any employee of the insured *arising out of and in the course of his employment* . . . . [Emphasis added.]

These insurers contend that an intentional tort by one's employer cannot possibly "arise out of and in the course" of one's employment. The district court found the insurer's argument persuasive and granted summary judgment to the WC/EL insurers on this basis. We disagree.

It is undisputed that Viock's injuries were caused by his long-term exposure to toxic chemicals and congestive dusts *at his work*. But for his job, there is no question that Viock would not have sustained these injuries. It strains credulity, therefore, for the appellee-insurers in this case to contend that these injuries did not "arise out of and in the course of" Viock's employment.

In support of their assertion, the WC/EL insurers cite two Ohio Supreme Court cases, neither of which concerned the construction of an Employers Liability insurance contract. *See Brady v. Safety-Kleen*, 576 N.E.2d 722, 730 (Ohio 1991) (Ohio statute purporting to grant exclusive jurisdiction to an administrative agency to award damages in employer-employee intentional tort cases held unconstitutional); *Blankenship*, 433 N.E.2d at 576 (employer has no immunity from common law causes of action brought by its employees arising out of its own intentional torts).

These cases do not stand for the proposition that, where an employee is injured by his employer's intentional tort, the employee's injuries did not "arise out of and in the course of" his employment within the meaning of that language in an Employers Liability insurance contract. Further, there is both persuasive and controlling Ohio precedent to the contrary.

In *Jones*, the court held that an employee was free to pursue workers compensation benefits for his injury without prejudicing his common law action for intentional tort and, in fact, could recover in both. *Jones*, 472 N.E.2d at 1054-55. Thus, an injury could "arise out of and in the course of" an employee's employment and yet also be the product of his employer's intentional tort. Moreover, in *Harasyn*, the court held that an employer was covered under an Employers Liability insurance policy for liabilities arising out of its intentional torts. The endorsement under which coverage was found contained language substantially similar to that in the WC/EL policies in this case, including the provision that the liability be based upon injuries "arising out of and in the course of [the employee's] employment by the Insured." *Harasyn*, 551 N.E.2d at 963. The court construed this provision and held that, "*[o]n its face*, that coverage reaches the [intentional tort] claims in this case." *Id.* at 966 (emphasis added).

On the basis of *Jones* and *Harasyn*, therefore, we hold that the limitation of coverage under an Employers Liability policy to injuries "arising out of and in the course of" the injured employee's employment means no less and no more than it says: the fact of the employee's employment must be causally related to the injuries. Accordingly, we hold that Viock's injuries "aros[e] out of and in the course of" his employment with S-W. To the extent that the summary judgments in favor of the WC/EL insurers were based upon a contrary conclusion, those judgments are vacated.

III. Individual Insurers

Having resolved these general issues, we turn to the specific arguments raised by each insurer in support of summary judgment on the issue of coverage.

A. Lumbermens

Lumbermens provided three types of policies to S-W: GCL, WC/EL and E/U. The summary judgments with respect to Lumbermens' GCL and E/U policies are vacated on the grounds that genuine issues of material fact remain. *See* Section II.C.1., *supra*.

Lumbermens' first two arguments with respect to its WC/EL policy have been disposed of in Section II.C.2., *supra*. Lumbermens also argues that coverage should be denied because Viock's exposure to the injurious conditions continued beyond the period of time covered by the Lumbermens policies and because notice of S-W's potential loss was not timely in that the Viocks' suit was filed thirty-seven months after the end of Lumbermens' coverage. Because the district court did not reach these issues, and because Lumbermens' ability to raise them is the subject of S-W's waiver and estoppel claims concerning which the district court has deferred judgment, we decline to affirm summary judgment in favor of Lumbermens on this basis. Therefore, that judgment is vacated and we remand this issue, together with the issue of Lumbermens' liability on its GCL and E/U policies, to the district court for further proceedings.

B. Travelers

Travelers issued both GCL and WC/EL policies to S-W. We have rejected Travelers's sole argument in favor of summary judgment on its GCL policy. *See* Section II.C.1., *supra*. This issue, therefore, is remanded for further proceedings.

The first two arguments Travelers raises with respect to its WC/EL policy have also been resolved against it. *See* Sections II.B. and II.C.2.b., *supra*. The Travelers policy limits coverage, as did the policies from Lumbermens, based upon the timing of injuries caused by "accident" and injuries from exposures causing "disease." However, because Travelers has not raised this issue, the question of Travelers' liability under its WC/EL policy is remanded, together with the issue of its liability under its GCL policy, to the district court for further proceedings.

C. Aetna

Aetna provided only WC/EL policies to S-W. Its two "plain language" arguments against coverage have been rejected. *See* Section II.C.2., *supra*. Similarly, Aetna's argument in favor of an implied exclusion for post-issuance changes in the law has also been rejected. *See* Section II.B., *supra*.

Aetna also argues that coverage is precluded under a clause which limits coverage to those employee injuries "for which no benefits are payable under the Workmen's Compensation Laws . . . ." Here, Aetna argues, benefits were payable, and in fact were paid, to Viock and, therefore, there is no coverage. We disagree. S-W's intentional torts are not covered by Ohio's workers compensation laws, and no such benefits are "payable" under those laws. *Blankenship*, 433 N.E.2d at 576. The monies Viock received in 1976 are unrelated to the Viocks' common law claims against S-W in 1981. This point is denied.

For the foregoing reasons, we hold that there are no genuine issues of material fact regarding the question of S-W's coverage for Viock's injuries under the Aetna WC/EL policy in this case.[8] The plain language of that policy provides coverage to S-W. Accordingly, and to the extent not inconsistent with Section II.A.3., *supra*, we reverse the summary judgment in favor of Aetna and remand with instructions for the district court to enter summary judgment for S-W.

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[8] Aetna's policy contains the same restrictions regarding the timing of covered injuries and claims as those in the Lumbermens and Travelers policies. These provisions pose no obstacle to summary judgment against Aetna, however, as its coverage extended beyond the last day of Viock's employment.

D. Weavers

Weavers sold E/U policies to S-W for a period of time running from before Viock's termination to after his filing of the underlying state tort action. Weavers' policies provide excess coverage for only those losses covered by the Aetna WC/EL policies. As noted in the preceding section, this is such a loss. The Weavers policies, however, further limit coverage to losses stemming from "occurrences." As we held in Section II.C.1., *supra*, the applicability of this provision presents an issue of fact and may not be decided on summary judgment. Therefore, we vacate the summary judgment in favor of Weavers and remand this portion of the case to the district court for further proceedings.

E. ELAC

ELAC sold E/U policies to S-W during the period of Viock's employment and injury. ELAC's sole argument against coverage has been rejected in Section II.C., *supra*. Therefore, we vacate the summary judgment in favor of ELAC and remand this portion of the case to the district court for further proceedings.

F. AHAC

AHAC sold E/U policies to S-W during the period of Viock's employment and injury. AHAC's first argument against coverage has been rejected in Section II.C., *supra*. AHAC's second argument is based on a policy endorsement which provides:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants, into or upon land, the atmosphere, or any watercourse or body of water; but this exclusion

does not apply is such discharge dispersal, release or escape is sudden and accidental.

Because it is undisputed that Viock's injuries were caused by his exposure to highly-volatile, toxic cements and solvents as well as various congestive dusts, AHAC argues that the "pollution exclusion" set out above precludes coverage.[7] We disagree.

For the exclusion to apply, its terms require that a "discharge, dispersal, release or escape" of the offending substances occur. A "discharge" is defined as "a flowing or issuing out." To "disperse" is defined as "to cause to breakup and go in different ways"; "to cause to become spread widely." A "release" is defined as "the act of liberating or freeing : discharge from restraint." An "escape" is defined as an "evasion of or deliverance from what confines, limits, or holds." *Webster's Third New International Dictionary* 644, 653, 1917, 774 (1986).

The fumes and dust that injured Viock, it is undisputed, were confined inside S-W's plant and, in fact, were confined to that portion of that plant involved in the gluing process in which Viock worked. It strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to Viock's lungs, had somehow been "discharged, dispersed, released or escaped." Or, considering that the fumes were confined to Viock's work area, that they had been discharged into the "atmosphere," as that word is ordinarily understood. *See Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993) (pollution exception not applicable injuries from exposure to asbestos in confined area rather than "atmosphere"). Without belaboring the obvious, we hold that this exclusion is intended to shield the insurer from the liabilities of the insured to outsiders, either neighboring landowners or governmental entities enforcing environmental laws, rather than injuries caused by toxic substances that are still confined within the area of their intended use.

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[7] We note that this exclusion appears in several of the policies purchased by S-W. To date, however, none of the other insurers have argued its applicability.

AHAC places principle reliance on *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096 (Ohio 1992), *cert. denied*, 113 S. Ct. 1585 (1993). *Hybud*, in our view, while primarily concerned with the "sudden" exception to this exclusion, actually supports our reading of this clause. There, the insured, a former owner of a landfill and transporter of waste material, was sued by a neighboring land owner, the United States Environmental Protection Agency and the State of Ohio. Thus, the application of the exclusion was so obvious that it was not even discussed. Rather, attention focused on the plain meaning of the words "sudden and accidental."

Accordingly, we hold that Ohio courts would limit the use of this exclusion to its plain language and obvious purpose. Therefore, the issue of AHAC's liability on its E/U policies is remanded to the district court for further proceedings regarding the applicability of the "expected or intended" clause.

G. Youell

Youell issued a series of Work-in-Progress policies (WIP's). These policies are in two parts: (1) an "all-risk" policy covering all materials and work-in-progress; and (2) a general liability policy providing:

> To cover the legal liabilities of the Assured world wide to Third Parties and/or other interests in respect of loss of life and/or personal injury and/or damage to property and/or other liabilities howsoever and wheresoever arising in connection with their business . . . including legal liabilities arising out of any fault or defect . . . or arising in any other circumstance howsoever . . . .

Excluding liabilities arising under -
(a) Road Traffic Acts or equivalent foreign legislation.

(b) Any Employers' Liability or Workmen's Compensation legislation.

As we have repeatedly noted, S-W's liability to the Viocks arose under the common law and specifically did not, and could not, arise under Ohio's workers compensation scheme. *Blankenship*, 433 N.E.2d at 576. Therefore, Youell's protestations to the contrary notwithstanding, we hold that neither of the two express exclusions contained in the WIP policy preclude coverage.

The district court granted summary judgment in favor of Youell on the ground that, because the WIP policies were issued prior to the *Blankenship* decision, such liabilities could not have been contemplated. As we held in Section II.B., *supra*, we reject this argument.

Accordingly, and to the extent not inconsistent with Section II.A.3., *supra*, we reverse the summary judgment in favor of Youell and remand with instructions for the district court to enter summary judgment in favor of S-W.

IV.

For all of the foregoing reasons, we rule as follows:[8]

1. To the extent of the Viocks' $2,500,000 punitive damages award, all the summary judgments entered in favor of the insurers are **AFFIRMED**.

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[8] This opinion constitutes the unanimous view of the court as to all sections, with the exception of Section II.C.1., from which Judge Ryan dissents, and Section II.C.2.a, from which Judge Joiner dissents.

2. In all other respects, however, the summary judgments entered in favor of the insurers are **VACATED**.

3. The case is **REMANDED** to the district court for further proceedings not inconsistent with this court's opinion.

RYAN, Circuit Judge, concurring in part and dissenting in part. Although I concur in much of what is said in the majority opinion, I do not agree that the district court's award of summary judgment to the GCL and E/U insurers must be reversed. The majority opinion holds that there is a question of fact whether S-W Industries acted with knowledge that injury to Viock "was substantially certain to occur." I do not believe this conclusion is supported by Ohio law, or by the law of the case.

In Ohio, an employer is immune from liability for workplace injuries, absent a finding that it committed an intentional tort. *Blankenship v. Cincinnati Milacron Chem., Inc.*, 433 N.E.2d 572, 575-77 (1982). This intentional tort exemption to workers compensation exclusivity encompasses those acts "committed with intent to injure another, or committed with belief that such injury is substantially certain to occur." *Jones v. VIP Development Co.*, 472 N.E.2d 1046, 1046 (Ohio 1984).

In *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987), the Ohio Supreme Court held that an employer's intentional tort, as defined in *Jones*, could not be covered by GCL policy language identical to that here, because the policy excluded expected or intended injuries, and, by definition, work-related intentional tort injuries are expected or intended. The majority maintains, however, that *Wedge* does not control this case, apparently on the theory that in equating "expected or intended" injuries with the belief that injuries are "substantially certain to occur," the *Wedge* court did not have in mind situations where the employer should have, but may not have known that injury was substantially certain to follow. And Viock's jury, the majority correctly observes, found S-W liable for intentional tort upon an instruction that permitted the verdict if the jury found that the risks to Viock merely "should have been known." According to the majority, this is not the kind of intentional tort that is the equivalent of an "expected or intended" injury that the *Wedge* court held would preclude insurance coverage.

In my view, that is not a correct reading of *Wedge*. That court did not condition its ruling on a finding that the employer-insured had acted with knowledge that injury was substantially certain to occur, or with any other specific state of mind. There were no findings of fact in *Wedge*. Rather, the case was a declaratory judgment action brought by the insurer, who was arguing that it had no duty to defend a work-related intentional tort action because its policy excluded coverage for expected or intended injuries. Thus, the court was expressing a general rule that work-related intentional torts are necessarily expected or intended, and therefore not covered by policies excluding expected or intended injuries.

The majority opinion also contends that the *Wedge* decision was really driven by public policy concerns, now obviated by subsequent court decisions. It is difficult to discern the basis for this conclusion. Only after concluding that there was no "possibility of coverage" did the court mention "public policy," and then only in the categorical statement that "public policy is contrary to insurance against intentional torts." *Id.* at 76.

The Ohio Court of Appeals expressly held that the *Viock* trial court's "knew or should have known" instruction was sufficient to support an intentional tort verdict because it was synonymous with the "substantial certainty" language of *Jones*. *Viock v. Stowe-Woodward Co.*, No. E-84-27, 1986 WL 3254, slip op. at 14 (Ohio App. 1986). That being so, the intentional tort liability imposed on S-W is precisely within the *Jones* definition of work-related intentional tort that *Wedge* holds "is not covered by an insurance policy which provides protection for bodily injuries 'neither expected nor intended' by the employer." *Wedge*, 509 N.E.2d at 76. It is indisputable, I think, that under Ohio law injuries that are a "substantial certainty" are "expected or intended." I would affirm the district court's summary judgment for the GCL and E/U insurers. Otherwise, I concur in the majority opinion.

CHARLES W. JOINER, Senior District Judge, concurring in part and dissenting in part. Although at first blush *Wedge Products, Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74 (Ohio 1987), appears to provide a solution to the intentional tort coverage problem in this case, the opinion by Judge Suhrheinrich makes clear that *Wedge* should be distinguished. The opinion also makes clear that Ohio's developing law in this area does not support a reading of *Wedge* that would deny coverage. Our task is to make our best effort in finding and applying Ohio law. Judge Suhrheinrich's opinion reaches the result most likely to be reached if this case were to be decided by the Ohio court. For these reasons, I join in Part II.C.1. of the opinion.

I part company with Judge Suhrheinrich in his analysis of the geographical scope of the coverage afforded by the Aetna and Lumbermens WC/EL policies, specifically, the construction in Part II.C.2.a. of the opinion of the Broad Form All States Endorsement. Both policies include standard form, identical versions of this endorsement.

To discern the meaning of the All States Endorsement, I start with the basic insuring agreement. The WC/EL policies at issue have both Coverage A, pertaining to benefits payable under workers' compensation laws, and Coverage B, entitled "Employer's Liability." The declaration pages of the policies state in item 3 that Coverage A applies to the listed states, and no policy includes Ohio. The policies further provide that Coverage B exists as to operations of the insured in the states listed in item 3 of the declarations.

The All States Endorsement provides:

> 1. If the insured *undertakes operations in any state not designated in Item 3* of the declarations, *other than . . . Ohio* [and five other states], Coverage A applies *to such operations*.

(Emphasis added.) Like in the basic insuring agreement, the scope of Coverage B under the All States Endorsement tracks the scope of Coverage A:

> 3. Coverage B applies to *operations of the insured covered by this endorsement.* The limit of liability for bodily injury by disease, including death resulting at any time therefrom, applies as though each state *in which such operations are conducted* were designated in Item 3 of the declarations.

(Emphasis added.) The term "this endorsement" clearly applies to the single endorsement entitled "All States Endorsement," and embodies all of the limitations in that endorsement. Two conclusions flow from this language: (1) the endorsement limits itself to *operations outside Ohio* and five other states; and (2) Coverage B is limited to *operations of the insured covered by this endorsement*. The only rational conclusion is that the endorsement was intended *not* to cover Ohio.[1]

If this were the only provision regarding the geographical scope of the coverage afforded by the WC/EL policies, then coverage would not exist as to either of the Lumbermens or Aetna policies. However, Aetna has an additional endorsement that provides coverage for the loss at issue here.

Aetna's Employers' Overhead Endorsement provides that the insurance afforded under Coverage B also applies to bodily injury by accident *or* disease sustained by an employee of the insured, employed in one of the designated states, *including Ohio*, arising out of and in the course of his employment by the insured, "but only with respect to . . . [s]uch injury or death for which no benefits are payable under the Workmen's Compensation Laws of such state[.]" As we hold in Part III.C. of the opinion, Aetna does not benefit from this limitation on coverage, because workers' compensation benefits were not payable to Carl Viock for his intentional tort injury.

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[1] The opinion relies on paragraphs 4 and 8 of the endorsement, but these provisions do not provide guidance one way or the other as to geographical scope of Coverage B. Paragraph 4 simply defines the word "state" (in contrast to, *e.g.*, Puerto Rico and Canadian provinces), and does not purport to enumerate *which* states are covered. Paragraph 8 simply makes all other consistent provisions of the policy applicable to the insurance provided by the endorsement.

Thus, I agree that S-W is entitled to entry of summary judgment against Aetna. Unlike Judge Suhrheinrich, however, I do not base this conclusion on the All States Endorsement but, rather, on the Employers' Overhead Endorsement. The very existence of the Employers' Overhead Endorsement supports the conclusion that the All States Endorsement does not provide coverage. Significantly, the states *ex*cluded by the All States Endorsement are *in*cluded in the Employers' Overhead Endorsement (except West Virginia, which is excluded from both). The opinion's reading of the All States Endorsement renders the Employers' Overhead Endorsement a nullity.

My view of the All States Endorsement would have a practical effect only on the disposition of Lumbermens' appeal. Thus, I concur in the result reached as to Aetna, and dissent, for the reasons stated, with respect to the disposition of Lumbermens' liability on its WC/EL policies only.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Lumbermens Mutual Casualty Company,

Plaintiff

v.

S-W Industries, Inc. et al.,

Defendants

Case No. 3:86CV7339

MEMORANDUM AND ORDER

Potter, J.:

This is a diversity action brought by plaintiff Lumbermens Mutual Casualty Company (Lumbermens) to determine the rights and obligations of all the parties under various policies of insurance with regard to the amounts paid out by defendant S-W Industries, Inc. (SW) for compensatory and punitive damages as the result of a judgment entered in an underlying tort litigation, Viock v. Stowe-Woodward Co., No. E-84-27 (Ohio Ct. App. March 14, 1986) (Viock litigation). Pending are six motions for summary judgment: two filed by defendant SW (Doc. 220, 249), one by defendant The Travelers Insurance Company (Travelers) (Doc. 199), one filed jointly by defendants National Union Fire Insurance Company (National) and American Home Assurance Company (American Home) (Doc. 212), one by defendant Employers' Liability Assurance Corporation, Ltd. (Employers') (Doc. 215), and one by defendant H. S. Weavers Agencies, Ltd. (Weavers) (Doc. 275). Additionally, there are three motions for partial summary judgment on the issue of insurance coverage filed by: plaintiff Lumbermens (Doc. 204), defendant Youell & Companies (Youell) (Doc. 209), and defendant Aetna Casualty & Surety Company, Inc. (Aetna) (Doc. 213). For the reasons stated below, defendant SW's motions for summary judgment will be denied, and defendant Youell's motion for partial summary judgment will be denied, and all other motions for summary judgment and partial summary judgment will be granted.

This case encompasses an insurance dispute between SW and several insurers relating to a $3,650,000.00 judgment entered against SW in the Viock litigation. The injury giving rise to the litigation occurred at SW's Sandusky, Ohio facility. On February 5, 1982, Carl W. Viock, his wife, and their children filed an action against SW in the Common Pleas Court of Erie County, Ohio. Mr. Viock alleged that while he was employed by SW, from January 1968 to June 1981, SW "fraudulently, intentionally and/or maliciously exposed [him] to toxic substances . . . as a condition of continued employment," and that SW "fraudulently, intentionally and/or maliciously disguised working conditions and withheld and/or concealed from [him] and his physicians material information and warnings concerning the toxic substances to which [he] was continuously and repeatedly exposed." (Doc. 214 Exhibit C.)

Following a lengthy trial, the jury returned a verdict for the Viocks. The jury also answered interrogatories concluding that "Stowe-Woodard Company's intentional conduct injured Carl Viock." (Doc. 214 Exhibit D.) The jury initially awarded Mr. Viock $750,000.00 in compensatory damages and $2.5 million in punitive damages, Mr. Viock $400,000, and each of the four Viock children

$25,000.00. However, on June 26, 1984, the trial court reduced the compensatory damage award by 20% on the basis of comparative negligence, and ordered SW to pay a total of $1 million in compensatory and $2.5 million in punitive damages.

Subsequently, the Court of Appeals of Erie County, Ohio affirmed the award of $2.5 million in punitive damages, reverse the award to the Viock children and reinstated the original compensatory awards of $750,000.00 and $400,000.00 to Mr. and Mrs. Viock. SW has paid this judgment and currently seeks indemnification from its insurers. It is undisputed that SW has paid a total of approximately $5 million in connection with the Viock litigation. However, it is unclear whether any of the insurance policies at issue provide coverage for this loss.

In the present case, Lumbermens filed its original complaint on May 9, 1986 seeking a declaratory judgment. In July of that year, SW filed a motion to transfer this action to the District Court of Rhode Island or, in the alternative, to dismiss or stay Lumbermens' action. After more than two years of litigating the transfer issue, the Sixth Circuit Court of Appeal resolved the issue and remanded the case to this Court for trial.

In accordance with the remand, this Court held a pretrial conference on December 12, 1988. Pursuant to the pretrial order this action would be conducted in three stages:

(1) Within ninety days, the parties will take discovery limited to the issue of the law to be applied and file appropriate motions;

(2) Within ninety days of the Court's decision on these motions, the parties will take discovery and file motions for

summary judgment directed to the issue of insurance coverage;

(3) Following the Court's ruling on the motions for summary judgment, a pretrial shall be held for the purpose of establishing a discovery schedule and the filing of a trial date, if necessary.

On August 1, 1989, this Court ruled that Ohio law will apply to the interpretation of contracts at issue in this case. Because the Ohio Supreme Courts ruling as to whether Ohio public policy prohibited the insurance of intentional torts was potentially dispositive of the coverage issues raised here, this case was delayed pending the Ohio Supreme Court's ruling in Harasyn v. Normandy Metals, Inc., 49 Ohio St. 3d 173 (1990). Unfortunately, though the Harasyn decision did reiterate the fact that punitive damages are not insurable in Ohio, it did not resolve the present coverage dispute regarding punitive damages. Consequently, this action is in the second stage of proceeding. The Court is now considering several motions for summary judgment and partial summary judgment on this limited issue of insurance coverage.[1]

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[1] SW filed a cross-motion for summary judgment arguing that Lumbermens and Travelers could not deny coverage based on the doctrines of waiver and estoppel. However, in its April 24, 1991 order, the Court stated:

> As for SW's waiver and estoppel arguments, the Court agrees with Lumbermens that those issues are best left unresolved until a determination is first made as to whether the policies in issue could provide coverage for the Viock judgment. If the policies could not provide coverage, the Court need only decide whether Lumbermens and Travelers are entitled to raise the arguments they make, and if they are, whether coverage can be created through SW's waiver and estoppel arguments. If coverage does exist, SW's

Because of the sheer number and duplicative nature of the motions before it, the Court will address the issues presented by the various motions rather than addressing each motion individually. However, the standard for evaluating each summary judgment motion remains the same.

The principle purpose of summary judgment is to isolate and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Fed. R. Civ. P. 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such decision. Further, Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. Id. at 324; Cincinnati Newspaper Guide v. Cincinnati Engineers, 863 F.2d 439, 441 (6th Cir. 1988). To oppose a motion for summary judgment successfully, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986).

To determine which facts are material, a court must look to the substantive law to be applied. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). If the dispute about a material fact is

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waiver and estoppel arguments are, in most respects, moot.
Accordingly, the Court will reserve ruling on the issues of waiver and estoppel until after it decides the coverage issues.

genuine, *i.e.*, if the evidence is such that a reasonable jury could return a verdict for the non-moving party, summary judgment should be denied. *Id.*

Punitive Damages

In the present case, $2.5 million of the indemnification SW seeks was paid out in the form of punitive damages in connection with the *Viock* litigation. This expense is not insurable under any of the insurance policies at issue here.

It is clear that insurance for punitive damages is against the public policy of Ohio. As the Ohio Supreme Court recently observed, "punitive damages are awarded to punish and deter the tort feasor, rather than compensate the victim." *Harasyn*, 49 Ohio St. 3d at 176 n.3. Accordingly, there is a "much stronger public policy interest against insurance coverage which would indemnify the tort feasor against punitive damages." *Id.*

The issue of insurability of punitive damages was squarely addressed in *Casey v. Calhoun*, 40 Ohio App. 3d 83 (Cuy. Ct. App. 1987). In *Casey*, the Court held that "public policy prohibit" the enforcement of a clause in an insurAnce contract insuring against punitive damages." *Id.* In reaching this decision, the Court noted that the Ohio legislature and judiciary "have articulated a clear policy against the insurability of punitive damages and that a contract provision which contravenes that policy must be declared void." *Id.* at 85.

The Ohio Supreme Court recently reaffirmed this conclusion. *State Farm Mutual Ins. Co. v. Blevins*, 49 Ohio St. 3d 165 (1990). The Court stated:

> The purpose of punitive damages is to punish the offending party and make the offender an example to others so that they might be deterred from similar conduct. *Detling v. Chockley* (1982), 70 Ohio St. 2d 134, 24 O.O.3d 239, 436 N.E.2d 208. In accord with this purpose, Ohio law has long disfavored insurance against punitive damages resulting from the insured's own tort. *Casey v. Casey* (1987), 40 Ohio App. 3d 83, 531 N.E.2d 1348; *Willowick Towers Investment Co. v. General Ins. Co. of America* (Sept. 22, 1980), Lake App. No. 7-239, unreported; *Troyer v. Horavth* (1983), 13 Ohio App. 3d 155, 13 OBR 189, 468 N.E.2d 351; see, also, Prosser & Keeton, Law of Torts (5 Ed. 1984) 13, Section 2 (purpose of punitive damages would be frustrated by permitting insurance to indemnify the wrongdoer).

Id. at 168.

Although none of the insurance policies at issue in the case expressly provide for the insurance of punitive damages, Ohio law is clear that the $2.5 million dollars awarded as punitive damages in the *Viock* litigation is not subject to indemnity via any construction of any insurance policy. Therefore, summary judgment will be granted ion favor of all insurance companies on this issue.

Compensatory Damages

The insurance companies also contend that Ohio public policy prohibits employers from insuring against damages resulting from intentional torts. This is only partially accurate. In Ohio, a tort feasor cannot insure against intentional torts committed with intent to injure the victim. However, Ohio "public policy does not prohibit an employer from securing insurance against compensatory damages sought by an employee in tort where the employer's tortious act was one performed with the knowledge that injury was substantially certain to occur." Harasyn v. Normandy Metals, Inc., 49 Ohio St. 3d 173 (1990).

In Harasyn, the Court defined two different levels of intentional tort:

> The first level, which we will refer to as "direct intent," is where the actor does something which brings about the exact result desired. In the second, the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result.

Id. at 175. The Court then went on to find that only the second level of intentional torts could be insured. The Court also noted that "most employer intentional torts, including the claim pled in the instant case, fall into the latter category." Id. The Court in Harasyn then concluded by stating that "[w]here the employer's alleged tortious actions were not taken with deliberate intent to injure the employee, and where the damages sought are to compensate for injury rather than to punish wrongdoing, the public policy argument for depriving the employer of insurance protection is not compelling." Id. at 175-176.

In the present case, the Viock jury found that SW;s intentional conduct injured Mr. Viock. The jury did not find that SW intended to injure Mr. Viock. The insurance companies argue that it can be inferred from the fact that the jury awarded punitive damages that the jury believed that SW had a direct intent to injure Mr. Viock. The facts, however, do not support the insurance companies' theory. The jury was instructed that intent to cause injury was not necessary in order to find SW had committed an intentional tort. Moreover, the Viocks' attorney specifically argued in closing that the Viocks were entitled to punitive damages if "there was a reckless disregard for the legal rights of another." (Doc. 251 Exhibit D.) Because of these instructions, the jury's finding that SW committed an intentional tort can most properly be characterized as a finding that SW committed a second level tort. Such tort would require something less than a direct intent to injure Mr. Viock. Therefore, SW's conduct in this instance could legally be insured in Ohio. Because defendant Youell & Companies moved for partial summary judgment on this ground alone, its motion must be denied.[2]

The question remains whether any of the insurance policies at issue in this case can be read to provide coverage for a compensatory damage award flowing from an intentional tort. To facilitate analysis, the various policies can be divided into three categories: General Comprehensive Liability, Employer's Liability/Workmen's Compensation, and Excess Liability/Umbrella policies. In several instances, a single insurer has issued more than one type of policy. Also, several insurers have issued substantially similar policies covering different time periods.[3]

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[2] SW apparently purchased Work-in-progress policies from Youell & Companies. However, these policies have not been provided to the Court and there is insufficient information upon which to determine whether they would insure against the judgment obtained in the Viock litigation.

Before beginning a discussion of the language contained in the various types of policies, it should be noted that defendant National Union Fire Insurance Company has moved for summary judgment on the ground that it never issued an insurance policy to SW. It is SW's burden to rebut this contention by providing evidence of a policy. It has not done so. Consequently, defendant National Union Fire Insurance Company is entitled to summary judgment.

Comprehensive General Liability Policies

All of the Comprehensive General Liability (CGL) policies provide coverage for bodily injuries caused by an occurrence. Although the precise wording of each policy varies, an occurrence is generally defined as an accident, or event, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. (See Doc. 199 pg. 6, Doc 204 pg. 15). Whether the liability incurred in the Viock litigation is covered under the CGL policies depends on whether the injury suffered by Mr. Viock falls within the definition of occurrence.

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[3] Some of the similar policies contain minor differences in language. For the sake of clarity, minor differences between substantially similar policies will only be discussed when they impact the outcome of the ultimate question of coverage.

It is undisputed that in order for Mr. Viock to recover against his employer he had to establish that SW committed an intentional tort. Blankenship v. Cincinnati Milacron Chemicals, 69 Ohio St. 2d 7608 (1982). Prior to the enactment of Ohio's present workers' compensation law, Ohio Rev. Code §4121.80, in 1986, the standard governing Blankenship torts was set forth in Jones v. VIP Development Co., 15 Ohio St. 3d 90 (1984). Under the Jones standard, it was possible for an employee to recover for a Blankenship tort without proving that the employer acted with intent to injure. According to the syllabus in Jones, an intentional tort is "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." Id.

The Viock litigation was decided pursuant to the Jones standard. In order for Mr. Viock to have obtained a verdict and judgment in his favor, he was required to prove that SW acted with intent to injure or the belief that an injury was substantially certain to occur. SW is correct in its contention that the jury never explicitly found that SW acted with intent to injure. Therefore, in order to return a verdict in Mr. Viock's favor, the jury must have found that SW acted with the belief that the injury was substantially certain to occur.

With this in mind, it is clear that Mr. Viock's injury was not an "occurrence" as defined in the CGL policies. It is illogical to state that someone could have acted with the belief that an injury was substantially certain to occur and yet not have expected the injury. Because an injury that is expected by SW is not a covered "occurrence" under the language of the policy, there is no coverage for the Viock litigation under the CGL policies.

An identical result was reached by the Ohio Supreme Court in the leading case of Wedge Products v. Hartford Equity Sale Co., 31 Ohio St. 3d 65 (1986). In Wedge Products, the Court rejected the arguments of an employer insured under a CGL policy which provided coverage for an "occurrence" defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damages neither expected nor intended from the standpoint of the insured." Id. Because the underlying judgment against the insured employer resulted from employee recoveries on intentional (Blankenship) torts, the Court stated:

> Applying this test [Jones] to the intentional tort allegations contained in Pariseau's and Walls' complaints, we are unable to discern any possibility of coverage under the policy issued to Wedge by Hartford. The policy covers bodily injuries "neither expected nor intended" by Wedge. Under the Jones test an intentional tort by Wedge must necessarily involve either an intent to injure or a belief that injury is substantially certain to occur. Clearly, no coverage is provided if Wedge intended to injure Pariseau and Walls. More importantly, we are unable to see how Wedge could have committed any acts with the belief that Pariseau or Walls were[sic] substantially certain to be injured, yet not have "expected" such injury to occur.

Id. at 67; accord VIP Development, Inc. v. Cincinnati Insurance Co., 32 Ohio St. 3d 337 (1987).

In the present case, SW contends that there is coverage under the CGL policies. To bolster this contention it cites Physicians Ins. Co. v. Swanson, 58 Ohio St. 3d 189 (1991). However, the court's holding in Physicians is not inconsistent with a finding against coverage in the present case. In Physicians, the court held that "in order to avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended." Id. at 189. As discussed earlier, it is impossible to find that SW acted with the belief that the injury was substantially certain to occur and yet not have expected the injury. Consequently, there is no coverage under the CGL policies.

Employer's Liability/Worker's Compensation Policies

SW contends that it is entitled to indemnification for the Viock litigation under the Coverage B of Lumbermens', Travelers', and Aetna's Employer's Liability/Worker's Compensation policies. In all three companies' policies, Coverage B provides that the insurer is obligated:

> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom.
>
> (a) sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in Item 3 of the declarations or in operations necessary or incidental thereto, . . .

(Doc. 199 Exhibit B, Doc. 204, Doc. 213 Exhibit E.) Item 3 of the declarations states that "Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states. . . ." Each policy then goes on to list several states. It would appear then, from the body of the policy, that Coverage B applies only in states listed in Item 3. However, there is an endorsement entitled "Broad Form All States Endorsement" attached to the policy, which has the effect of extending Coverage B into additional states based on sW's operation in those states. It is this endorsement that is the basis of Lumbermens' argument against coverage.

Lumbermens contends that Coverage B does not apply in Ohio. It bases this claim on its reading of paragraphs one and three of the Broad Form All States Endorsement attached to its policy. These paragraphs state:

> 1. If the insured undertakes operations in any state not designated fin Item 3 of the declarations, other than Nevada, North Dakota, Ohio, Washington, West Virginia or Wyoming, Coverage A applies to such operations.
>
> . . .
>
> 3. Coverage B applies to operations of the insured covered by this endorsement. The limit of liability for bodily injury by disease, including death resulting at any time therefrom, applies as though each state in which such operations are conducted were designated in Item 3 of the declarations.

(Doc. 205 Exhibit E.) Lumbermens reads these paragraphs to mean that Coverage B applies only where Coverage A applies. This would be a correct interpretation were it not for the exclusion in paragraph 1.

In evaluating Lumbermens' reading it is useful to note three things: (1) Coverage A is entitled Workmen's Compensation, (2) Item 3 of the declarations states "coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states," and (3) at the time these polices were written, Ohio had a monopolistic worker's compensation law. Taking these factors into consideration, it is apparent that the Workmen's Compensation portion of the policy could not be applied in Ohio. This is the reason why Ohio is specifically excluded in paragraph 1 of the All States Endorsement. No such reasoning exists for excluding Ohio from Coverage B. Moreover, if Lumbermens meant to exclude Ohio in paragraph 3, it need only have repeated the states listed in paragraph 1.

A plain reading of the language of paragraph 3 of the All States Endorsement reveals that Coverage B is applicable to "operations of the insured covered by this endorsement . . . as though each state in which such operations are conducted were designated in Item 3 of the declarations." This would include Ohio. Consequently, this Court finds that Coverage B applies to SW's operations in Ohio.

It is undisputed that Coverage B only applies to injuries to an SW employee arising out of the course of his employment. It is also undisputed that Mr. Viock's injury arose out of an intentional tort committed by SW, his employer. However, the insurance companies contend that as a matter of Ohio law, intentional torts cannot arise out of the course of employment, therefore Coverage B does not apply to the Viock litigation. This contention is well taken.,

SW contends that the Ohio Supreme Court's decision in Harasyn establishes that SW's Employer's Liability/Worker's Compensation policies provide it with insurance coverage for the compensatory damages award in Viock. It is true that the Harasyn Court construed an employer's liability policy containing the same language as the policies at issue in the present case. However, the insurance policies at issue here must be viewed in the context in which they were written.

In Harasyn, the Ohio Supreme Court interpreted an insurance policy that was written post Blankenship. Moreover, the policy was written specifically for Ohio employers, and it contained a stop-gap endorsement not contained in any of the policies in this case. It was this stop-gap endorsement that the Court found to cover the Blankenship tort which was the cause of the underlying litigation. The Harasyn Court notes several times that this stop-gap endorsement was written and offered to the Ohio employers as coverage for intentional torts in the wake of Blankenship. Harasyn, 49 Ohio St. 3d at 174, 177, 181.

In contrast, the insurance policies in the present case were all written prior to the Ohio Supreme Court's decision in Blankenship. In Ohio, contracts of insurance are deemed to have been entered into by the parties in view of the estate of the law generally at the time as to coverage. Home Indemnity Co. v. Village of Plymouth, 146 Ohio St. 96 (1945). During the time these policies were purchased there was no recognized right to sue employers for intentional tort. See, Roof v. Velsicol Chemical Corp., 380 F. Supp. 1373 (N.D. Ohio 1974); Allied Chemical Corp. v. Earhart, 37 Ohio St. 2d 153 (1974). The Blankenship exception did not yet exist. Moreover, provisions in insurance policies purporting to insure against intentional tort were void as against public policy. Wedge Products, Inc. v. Hartford Equity Sales Co., 31 Ohio St. 3d 65 (1987). Therefore, these Employer's Liability/Worker's Compensation policies were not meant to, and do not, cover intentional torts. Consequently, they do not provide coverage for the Viock litigation.

Excess/Umbrella policies

The last set of policies which may provide coverage for the Viock litigation are the Excess/Umbrella policies. These policies are designed to insure against losses in excess of the primary CGL or Employer's Liability/Worker's Compensation policies' coverage limits. The Excess/Umbrella policies at issue in this case can be divided into two groups, those that follow the form of the primary insurance policy, and those that do not.

Defendant Weavers' policy follow the form of the underlying Aetna Employer's Liability/Worker's Compensation policy. This means that Weavers' policy does not provide coverage for personal injuries suffered by an employee of SW unless such coverage is available under Aetna's primary policy. As discussed previously, the Employer's Liability/Worker's Compensation policies do not provide coverage for the Viock litigation. Consequently, neither does the Weavers' policy.

SW argues that this result renders the Weavers policy illusory. This argument lacks merit. The Weavers policy provides excess coverage whenever Aetna's policy provides primary coverage. Aetna's policy is very extensive: it provides coverage for a wide range of situations in many states. Neither policy is illusory simply because it does not provide coverage in this particular instance.

Lumbermens, Employers', and American Home issued SW Excess/Umbrella policies which do not follow the form of the primary insurance policies. These policies are entirely separate from the primary insurance. Accordingly, even if the primary insurance provides coverage, this type of Excess/Umbrella policy may not. These policies have their own independent prerequisites to coverage which must be met in order to be indemnified for any loss.

In the present case, all of the non-form following policies contain the same provision. They all provide coverage for injuries "caused by or arising out of an occurrence" which is "neither expected nor intended from the standpoint of the insured." (Doc. 205 Exhibit M, Doc. 212 Exhibit A, Doc. 214 Exhibit B.) This is the same language discussed in connection with the CGL policies. As noted in the CGL section, this Court cannot envision a tort committed with the belief that an injury was substantially certain to occur, which would not also be expected from the standpoint of the insured. Wedge Products, 31 Ohio St. 3d 65. Therefore, regardless of the primary policy coverage, these Excess/Umbrella policies do not provide coverage for the Viock litigation.

Again, SW argues that such a finding renders these polices illusory. This argument is simply incorrect. These policies, subject to their own express terms, cover damages in excess of CGL, automobile liability, and employer's liability/worker's compensation policies in all states. Such coverage would indemnify a wide variety of losses. The fact that there is no coverage for the Viock litigation in no way renders these policies illusory.

Waiver and Estoppel

SW has filed cross motions for summary judgment against Lumbermens and Travelers on the issues of wavier and estoppel. During a hearing in this matter conducted on June 10, 1991, counsel for SW stated that there were factual issues with respect to waiver and estoppel, and the bad faith claim against Lumbermens of the type which would preclude summary judgment on these issues. (Doc. 295 pg. 47.)

It is also apparent to the Court that complicated factual issues still exist regarding waiver and estoppel. Questions remain concerning the effect of Lumbermens' paying for SW's representation in the Viock litigation for almost two years. A question also persists as to whether coverage has been "created" through the acts of the insurance companies where none would ordinarily exist. The parties have not had an adequate opportunity to brief these issues because of the Court imposed structure of the litigation. Therefore, the Court agrees with Lumbermens that these issues are best left for the next stage of this litigation. Consequently, the Court will deny SW's cross motions for summary judgment on the issues of waiver and estoppel.

Additionally, SW originally filed a cross motion for summary judgment against American Home on these same issues. SW subsequently withdrew this motion, while reserving "the right to refile its motion after further discovery." (Doc. 252 pg. 2). American Home objects to this reservation as being in opposition to this Court's order of December 13, 1988. In that order, the Court set deadlines for taking discovery and filing motions for summary judgment directed to the issue of insurance coverage. (Doc. 117). This order was intended to facilitate resolution of the coverage issues. The factual issues surrounding the waiver and estoppel arguments are reserved for the next phase of the proceeding. However, for the reasons stated above, American Home's motion for summary judgment has been granted. Because the cross claim against it will be voluntarily dismissed, the claim against American Home will be dismissed without prejudice. If SW wishes to pursue its waiver and estoppel theories against American Home it must refile.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that Lumbermens' motion for partial summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant The Travelers Insurance Company's motion for summary judgment be, and hereby is GRANTED; and it is

FURTHER ORDERED that defendants National Union Fire Insurance Company and American Home Assurance Company's joint motion for summary judgment be, and hereby is, GRANTED and defendant American Home Assurance Company is DISMISSED without prejudice; and it is

FURTHER ORDERED that defendant Employers' Liability Assurance Corp., Ltd.'s motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant H. S. Weavers Agencies, Ltd.'s motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendant Aetna Casualty & Surety Company, Inc.'s motion for partial summary judgment be, and hereby is, granted; and it is

FURTHER ORDERED that defendant Youell & Companies' motion for partial summary judgment be, and hereby is, DENIED; and it is

FURTHER ORDERED that defendant S-W Industries, Inc.'s motions for summary judgment be, and hereby are, DENIED.

United States District Judge

APPENDIX D

Case No. 92-4182: 92-4212

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
APR 06 1994

ORDER

LUMBERMENS MUTUAL CASUALTY COMPANY,

Plaintiff - Appellee Cross-Appellant

v.

S-W INDUSTRIES, INC.,

Defendant - Appellant Cross-Appellee

AETNA CASUALTY & SURETY COMPANY; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.; THE TRAVELERS INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY; YOUELL & COMPANIES; J.F. GREEN & OTHERS; H.S. WEAVERS AGENCIES, LTD.; UNDERWRITERS AT LLOYDS, LONDON.

Defendants - Appellees

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and JOINER, District Judge.*

Upon consideration of the petitions for rehearing filed by the appellees in case number 92-4182.

It is **ORDERED** that the petitions for rehearing be, and they hereby are, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.